

82-1500

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No. 82-1410

Office-Supreme Court, U.S.

FILED

Bernard P. Colokathis, FEB 15 1983
Petitioner

ALEXANDER L. STEVAS,
CLERK

v

Wentworth Douglas Hospital,
John L. Beckwith,
William Cuseck, Jr.,
Roger C. Temple,
H. Jack Myers,
John Neff

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES SUPREME COURT

Bernard P. Colokathis,
appearing Pro Se,
of 130 Mt. Vernon Street
Dover, New Hampshire
03820

QUESTION PRESENTED

Whether or not the United States Court of Appeals for the First Circuit was correct in affirming the decision of the United States District Court for the District of New Hampshire by ruling that it was not an abuse of discretion to dismiss the Plaintiff's case, sua sponte, immediately previous to a scheduled final pre-trial conference, without a hearing or consideration of lesser sanctions, for lack of prosecution, because one of the Plaintiff's attorneys had withdrawn and the Court anticipated further delay.

TABLE OF CONTENTS

Opinions below-----	Pg. 1.
Jurisdiction-----	Pg. 2.
Statute Involved-----	Pg. 3.
Statement of Case-----	Pg. 3.
Evidence-----	Pg. 5.
Rulings Below-----	Pg. 13.
Reasons for Granting the Writ-----	Pg. 16.
Conclusion-----	Pg. 30.

Appendix A.

Opinion of District

Court 11/15/82-----App., Pg. 1

Opinion of Court

of Appeals-----App., Pg. 8.

Opinion of District

Court -----App., Pg. 21

Order of District

Court 6/22/79-----App., Pg. 22

Order of District

Court 12/11/80-----App., Pg. 26

Order of District

Court 10/9/81-----App., p. 27

Order of District

Court 10/9/81-----App., p. 28.

Order of District

Court_10/28/81-----App., p. 33.

List of Defendants'

Objections to

Discovery-----App., p. 48.

Plaintiff's

Affidavit-----App., p. 51.

List of Defendant's

Motions to Extend-----App., p. 53.

Motion for Extension of

Time-----App., p. 55.

Plaintiff's Petition for

Rehearing-----App., p. 57.

Order of Court

12/10/82-----App., p. 66.

Letter to Plaintiff-----App., p. 68.

TABLE OF CASES

1. Anthony v. Marion County General Hospital, 617 Fed. 1164 (5th Cir. 1981).
2. Asociacion de Empleados del Instituo de Cultura Puerto-Riquena v. Rodriguez Morales, 538 F. 2d 914 (1st Cir. 1976).
3. Davis v. Operation Amigo, Inc., 378 F. 2d 101 (10th Cir. 1967).
4. Durgin v. Graham, 372 F. 2d 131 (5th cir. 1967).
5. Durham v. Florida East Coast Ry. Co., 385 F. 2d 366 (5th Cir. 1967).
6. Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146, (3rd Cir. 1968).
7. Edsall v. Penn Central Transportation Co., 479 F. 2d 33 (6th cir. 1973).
8. Flaska v. Little River Marine Construction Co., 389 F. 2d 885 (5th Cir.), cert den. 392 U.S. 928, 88 S. Ct. 2287, 20 L. Ed. 2d 1387 (1968).
9. Foxboro v. Fisher and Porter Co., 29 F.R.D. 522 (E.D. Pa. 1961).
10. Kuzma v. Bessemer & Lake Erie R.R. 259 F. 2d 456 (3rd Cir. 1958).
11. Link v. Wabash Railroad Co., 370 U.S. 626, 86 Fed. 2d 734, 82 S. Ct. 1386, (1962), reh. den. 371 U.S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115.

v.

12. Lyford v. Carter, 274 F. 2d 680 (5th Cir. 1980).

13. Marks v. San Francisco Real Estate, 627 F. 2d 947, (9th Cir. 1980).

14. Martin-Trigona v. Morris, 637 F. 2d 468 (1st Cir. 1980).

15. Medeiros v. United States, 621 F. 2d 468 (1st Cir. 1980).

16. Pond v. Braniff Airways, Inc., 453 F. 2d 347 (5th Cir. 1972).

17. Reizakis v. Loy, 490 F 2d 1132 (4th Cir. 1973)

18. Richman v. General Motors Corporation, 437 F 2d 196 (1st Cir. 1971)

19. Saylor v. Bastedo, 623 F 2d 230 (2nd Cir. 1980)

20. SEC v. Everest management Corp., 466 F. Supp 167 (S.D. N.Y. 1979)

21. Schenck v. Bear, Stearns & Co., 583 F 2d 58 (a2nd Cir. 1978)

22. Tinnerman Products, Inc. v. Geo. Garret Co., 22 F. R. D. 56 (D.C. Pa. 1958)

23. Zavala santiago v. Gonzales Rivera, 553 F 2d 710 (1st Cir. 1977)

ADDITIONAL AUTHORITIES

1. "Involuntary Dismissal for Disobedience or Delay: The Plaintiffs Plight", 34 Univ. of Chicago L. Rev. 922 (1966)
2. Waterman, "An Appellate Judge's Approach in Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders", 29 F.R.D. 420 (1961)
3. 9 Wright and Miller, Federal Practice and Procedure § 2369, 2370
4. 5 Moore's Federal Practice § 41

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES SUPREME COURT

To the Honorable, the Chief Justice and
the Associate Justices of the Supreme Court
of the United States:

BERNARD P. COLOKATHIS, the petitioner
herein, prays that a writ of certiorari
issue to review the judgment of the United
States Court of Appeals for the First
Circuit entered in the above-entitled case
on November 15, 1982.

OPINIONS BELOW

The November 15, 1982 opinion of the

Court of Appeals, whose judgment is herein sought to be reviewed, which will be reported, and is reprinted in the appendix to this Petition at pages 8-20 in the Appendix. On December 10, 1982, the Court refused a petition for rehearing and denied a Motion to Extend (Refer to pages 66-67 of the Appendix). The prior opinion of the United States District Court for the District of New Hampshire, also reprinted in the Appendix, are reported as follows on pages 1-7, and page 21.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1982. The Motion for Extension of Time was denied, and the petition for rehearing was refused on

December 10, 1982. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

STATUTE INVOLVED

There is no statutory provision involved.

STATEMENT OF THE CASE

This case was entered in the District Court on November 3, 1977. The complaint was brought against the Wentworth Douglass Hospital of Dover, New Hampshire as well as several doctors and administrators pursuant to 42 U.S.C. 1983. The Complaint alleges, inter alia, that certain doctors and hospital administrators had conspired to deprive the Plaintiff of surgical

privileges and thus unjustly deprive the Plaintiff of his livelihood. A sufficient nexus to State action was found because of the hospital's receipt of government funds and ultimate control of the hospital trustees appointed by the city council. (App., p. 33-47).

By the time of dismissal with prejudice for lack of prosecution on April 6, 1982, this case was the second oldest on the docket. It is asserted, however, that the Court acted prematurely and unreasonably in dismissing this case. The Court, in its order of November 15, 1982, quoted part of the November 13, 1981 ruling of the District Court, "This Court finds itself confronted with yet another procedural brouhaha in this overly protracted litigation..." (App., p. 2-3).

On October 9, 1981, Court had ruled

in part:

It is the order of this court that the case shall be tried December 7, 1981. If the Plaintiff discharges present counsel, the case will go on regardless of this fact.

The Plaintiff will appear pro se or otherwise the case will be dismissed with prejudice. (App., p. 31).

On December 7, 1982, the case did not go forward because the presiding Justice was ill, and the case was continued until April of 1982. Two days before the pretrial conference was scheduled, one of the attorneys engaged by the Plaintiff withdrew and the Court, on its own motion, dismissed the case with prejudice.

EVIDENCE

This has been a difficult case, the litigation has been protracted for various reasons: the number of Defendants, the

illness of the Presiding Justice, the difficulties of discovery, and the sudden withdrawal of Plaintiff's counsel at the most inopportune times. It is these last two problems that the defendants and the Court have relied on heavily, but these events were not within the control of the Plaintiff.

As to the first, it is obvious to note from the docket entries that the case was more than vigorously defended by all six defendants. As a matter of record, the Defendants entered at least twenty-five separate objections to the Plaintiff's requests for discovery (App., pp. 48-50). Furthermore, the defendants are not blameless in their actions, as they filed nine different requests for extension of time (App., pp. 53-54). It is clear from the evidence that defendants were not har-

rassed, but engaged in behavior calculated to prevent all proper attempts by the Plaintiff gain information necessary for the preparation of trial. This was a "paper war" instigated by the Defendants. For example, in 1979, the Plaintiff moved for a default judgment against one of the Defendants for failure to appear at a properly noticed deposition. While the Court denied the Plaintiff's motion, it noted that "counsel are being obdurate and making a travesty of the discovery process" (App., p. 23), as well as the fact that it appeared "that the deposition of the Plaintiff had been taken at least six times" (App., p. 23).

From these facts, it does not appear that the evidence supports the Defendants' and the Court's contention that the Plaintiff has engaged in the "dilatory

tactics" complained of in the District Court's opinion of April 6, 1982. (App., p. 2).

The Plaintiff has had a total of ten attorneys, some of whom served concurrently, and some who served as local counsel to meet the requirements of the District of New Hampshire Local Rule 5(b).¹ This is certainly not unusual in a case of this magnitude. In essence, he has hired two major law firms as trial attorneys: a Virginia firm and a New York firm. Two of the attorneys who appeared (Philip J. Hirschkopf and Victor M. Glasberg) were members of the same firm in Alexandria, Virginia. Leo N. Hirsch, Kurt J. Woolf and Charles Philamore Bailey, were members of Otterbourg, Steindler, Houston and Rosen, P. C. of New York. Hirsch subsequently left the firm and continued his appearance.

None of the attorneys heretofore mentioned were fired by the Plaintiff, and in fact, their withdrawals were a surprise to the Plaintiff. Additionally, the Plaintiff had various local counsel. Plaintiff's first local counsel, the firm of Flynn, McGuirk and Blanchard of Portsmouth, New Hampshire, were replaced by Arpair G. Saunders, Jr., in September of 1980 (App., p. 30) at the trial counsel's suggestion. On October 29, 1980, Alfred Catalfo of Dover, New Hampshire, entered an appearance after the sudden withdrawal of Saunders and the Virginia law firm on September 25, 1980, and withdrew almost immediately on November 17, 1980) (App., p. 30).

In December of 1981, the Virginia trial firm was replaced by Otterburg, Steindler, Houston and Rosen, PC., of New York (App., p. 30), and Mr. De Puy entered an

appearance as local counsel (App., p. 30).

Subsequently there was a change in the law firm of Otterburg, in New York, the firm withdrew (App., p. 30), and individual attorneys Hirsch and Bailey entered appearances (app., p. 30). Local counsel withdrew when the firm withdrew (App., p. 30). Any delays caused the Court by change of counsel to this point were either permitted by the Court or not objected to by the defense. However, it was also clear that these changes had provoked the Court, as it commented in an order of the District Court dated December 31, 1981 quoted by the District Court on November 15, 1981:

...this case has been on the docket for an interminable period of time, the Plaintiff keeps hiring and firing attorneys whenever the case is set for trial (App., p. 2).

Finally, Mr. Charles Meade of

Manchester entered as local counsel on October 29, 1981 (See Docket Entry #283). The case was scheduled for trial in December of 1981 (App., p. 26). Trial was put off by the Court's own motion due to the illness of the Presiding Justice.

Plaintiff continued his preparations for trial, and, in March was advised of the final pretrial and trial schedule through counsel. The case was scheduled for number one jury trial the week of April 27, 1982, with a final pretrial conference set for April 8, 1982.

Unexpectedly, on April 2, 1982, attorney Leo Hirsch of New York called the Court to inform it of his withdrawal. His "Motion for Leave to Withdraw", dated April 2, 1982, was received by the Court on April 5, 1982 (refer to Docket entry #315). On April 2, 1982, the Court mailed notice to the

Plaintiff advising him that Hirsch intended to withdraw and that he, the Plaintiff, should attend the April 8 1982 pretrial conference. (The letter from the Court, dated March 2, 1982, appears to be in error, as no communication of the withdrawal had been made until April 2, 1982.)

Plaintiff instructed his local counsel to continue preparation for trial, to expect him at the pretrial conference, and to instruct the Court accordingly. On April 6, 1982, the Court, sua sponte, dismissed the case with prejudice for lack of prosecution because of Attorney Hirsch's withdrawal. (App., pp. 1-7).

Plaintiff's other counsel, Mr. Meade, received notice of the dismissal on April 6 1982 by telephone, but did not receive a copy of the court order until April 9, 1982, a delay presumably caused by a major

snowstorm which caused the Court to be closed from the afternoon of April 6, 1982 and all of April 7, 1982. Mr. Meade contacted Judge Loughlin at his home on April 7, 1982 to confirm that the case had been dismissed. That day Mr. Meade informed the Plaintiff of the dismissal by telephone and informed the Plaintiff that he would have to move to vacate the order of the Court and to reinstate for trial. On April 8, 1982, the Plaintiff was able to travel to New Hampshire from Connecticut, where he had been employed, and complete an affidavit that he intended to proceed to trial on April 27, 1982 and that no further delay was sought. This affidavit (App., pp. 51-52) was attached to a Rule 60(b) motion to vacate the dismissal and reinstate for trial, which was forwarded to the Court on April 9, 1982 and entered on April 12, 1982. On April 14,

1982, this motion was denied and thus the dismissal stands (App., p. 21).

THE RULINGS BELOW

The District Court ruled to dismiss the case with prejudice, citing the Plaintiff's practice of "hiring and firing" attorneys and the "dilatory tactics" of the Plaintiff in this case (App., pp. 1-7). It obviously anticipated further delay should the Plaintiff hire new counsel and the Court give the counsel leave to for an extension of time to review the case. Furthermore, the Court, citing its heavy caseload, found that dismissal with prejudice was the proper remedy. It noted the "voluminous discovery and depositions" but was of the opinion that "mnemonics would be needed to try this case." (App., p. 7).

The Court relied on Link v. Wabash

R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) to support its case with Medeiros v. United States, 621 F. 2d 468. (App., pp. 1-7).

Further, the trial Court denied the motion by one of Plaintiff's remaining counsel for reinstatement. (App., p. 21).

The Court of Appeals highlighted the facts that there had been extensive discovery completed by the Plaintiff's first counsel that after new trial counsel entered the case in 1980, there was concern expressed by the trial Court over the lack of discovery. The Court also appeared to be impressed by the fact that both main trial attorneys who withdrew, (Glasberg et. al. and Hirsch) alleged "irreconcilable differences" with the Plaintiff. The Court found that, in view of the "dilatory tactics of the plaintiff, the cost to the defen-

dants, the waste of judicial resources and the probability of further delay" (App., 1-7) all given as reasons for the dismissal, the lower Court was within its discretion.

As to the issue of whether or not the trial Court should have invoked less drastic sanctions, the Court of Appeals merely reiterated the reasons of the lower court, citing Medeiros v. United States, 621 F. 2d 468, 470 (1st Cir. 1980) (quoting Zavala Santiago v. Gonzalez Rivera, 553 F. 2d 710, 712 [1st Cir. 1977]) (App., p. 16) where it was ruled that such a sanction was necessary to "prevent the further delay and harassment of the court and the defendants" (App., p.16).

It also found the Plaintiff's delays were "due largely to his inability to get along with his counsel with the result that after four and one half years the case

was still not prepared for trial" (App., p. 19).

For the abovementioned reasons, the Court, on appeal, found that there was no unfairness in not permitting the Plaintiff one more opportunity to persuade the court that there would be no further delays.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to allow the Court to review the questions of the balancing of the rights of a Plaintiff against the needs for judicial economy.

In the instant case, the Court abused its discretion in dismissing the case of a Plaintiff therefore disallowing the Plaintiff a hearing on the merits. While the Court has an inherent power to dismiss a case for lack of prosecution (Link v. Wabash R.R. CO., 370 U.S. 626, 82 S. Ct. 1386, 8 L.

Ed. 2d 734 (1962), reh. den. 371 U. S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115), the evidence is clear that this power was misapplied in the instant case. In Medeiros v. United States, 621 F. 2d 468 (1st Cir. 1980), it was said that the sanction of dismissal with prejudice is indicated in those cases where lack of prosecution occurs in order to prevent "undue delays..., docket congestion, and, the possibility of harassment of a defendant."

The evidence shows that any undue delays were not within the control of the Plaintiff, that he was vigorously prosecuting, and that the defendants were not in fact being harassed. It is clear that the Court dismissed the case because of its congested docket. (The Court, in its April 6, 1982 decision, complained that he had 474 cases assigned to him [App., p. 5]). This

sets a very dangerous precedent in the face of the rulings that a trial court's order of dismissal should be tempered by a careful exercise of judicial discretion. Richman v. General Motors Corp., 437 F. 2d 196, (1st Cir. 1971), citing Durgin v. Graham, 372 F. 2d 130, 131 (5th Cir. 1967).

While there are no precise guidelines for an appellate court to determine whether or not the trial court has been within its discretion, the events and conditions existing in each case should be explored. Richman, supra, 437 F. 2d at 199. There is strong policy favoring the consideration of a case on its own merits, which is to be balanced against the effects any misconduct of the plaintiff. Richman, supra, at 199; citing Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146, 149 (3rd Cir. 1968); Flaska v. Little River Marine

Construction Co., 389 F. 2d 885, 888 (5th Cir. 1968), cert. den., 392 U.S. 928, 88 S. Ct. 2287, 20 L. Ed. 1387 (1968); Davis v. Operation Amigo, Inc. 378 F. 2d 101, 103 (10th cir. 1967).

Undoubtedly, the fact that the Court may have a burdensome caseload should not be the prime consideration. Lyford v. Carter, 274 F. 2d 815 (2nd Cir. 1960). In fact, the rights of the Plaintiff to redress of grievances should not depend on whether or not the Court is congested, although they will undoubtedly be affected by it.

The sanction of dismissal with prejudice is not usually applied except in the most frivolous of actions, and the Court will inquire carefully into whether or not the delay or misconduct of the Plaintiff should warrant dismissal. See, for instance, Reizakis v. Loy, 490 F. 2d 1132,

1135 (4th cir. 1973), citing Durham v. Florida East Coast Ry. Co., 385 F. 2d 366, 368 (5th Cir. 1967). See generally, 9 Wright & Miller, Federal Practice and Procedure Sec. 2369, 2370.

Dismissal has been warranted where there has been a clear showing of disobedience by Plaintiff or his counsel. Medeiros, supra, 621 F. 2d at 470-471; Asociacion de Empleados del Institute de Cultura Puerto-Requena et. al. v. Rodriguez Morales, 538 F. 2d 915 (1st Cir. 1976); Martin-Trigona v. Morris, 637 F. 2d 680 (5th Cir. 1980); Anthony v. Marion County General Hospital, 617 F. 2d 1164 (5th Cir. 1981).

However, dismissal with prejudice has not been adjudged the proper remedy where, as in this case, the Defendants contributed to the delay. Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146 (3rd Cir.

1968); Foxboro Co. v. Fisher & Porter Co., 29 F.R.D. 522 (E.D. Pa. 1961); Tinnerman Prods. Inc. v. Geo. Garret Co., 22 F.R.D. 56 (D.C. Pa. 1958).

It is obvious that the trial Court was very concerned that this case had been four and one half years on the docket. The Plaintiff recognizes that the necessity of an orderly and active docket is a consideration in dismissal for lack of prosecution. However, there are no rigid time limits governing the length of time any given case may remain on the docket. SEC v. Everest Management Corp., 466 F. Supp. 167 (S.D.N.Y. 1979); Marks v. San Francisco Real Estate, 627 F. 2d 947 (9th Cir. 1980).

In this case, the act which triggered the Court's ire was the withdrawal of the Plaintiff's counsel two days before the final pretrial, an act which the

Plaintiff had no control over. Clearly, the only possible impediment to judicial economy in the instant case was the Court's fear that further delay would be sought by the Plaintiff (App., p.7). Unfortunately, the Court mistakenly assumed that the withdrawal of Plaintiff's counsel would result automatically in further delay (App., p. 7). While it is clear that under the circumstances the Plaintiff's local counsel might have preferred additional time to prepare, the Plaintiff himself was willing to appear pro se, if necessary, in light of the Court's previous order of October, 1981, (App., p. 27), and had indicated that he was prepared to proceed to trial in his affidavit submitted with his motion for reinstatement (App., pp. 51-52). As a matter of fact, it was not necessary for the Plaintiff to appear pro se, as he would

have been able to go forward with his local counsel and remaining New York counsel. See, Schenck v. Bear Stearns & Co., 583 F. 2d 58, 25 F.R. Serv. 1505 (2nd Cir. 1978); Reizakis, supra, 490 F. 2d at 1134. Additionally, there is no Court rule that limits the function of local counsel to appear as "trial counsel".

The erroneous conclusion of the Court that the withdrawal would result in further delay was both premature and unfortunate. The Court had only to wait forty-eight hours for the final pre-trial conference in order to determine whether the Plaintiff had either abandoned the case or failed to prepare for trial.

While the Plaintiff is aware that the sharply divided opinion of Link v. Wabash Railroad Co., supra, 370 U.S. at 633-634 gives some credence to the view that he

is bound by the action of his counsel when his conduct results in dismissal, there are cases that have not followed that rule. Reizakis, supra, 490 F. 2d at 1135, citing Edsall v. Penn Central Transportation Co., 479 F. 2d 33, 35 (6th Cir. 1973). See generally, 5 Moore Fed. Proc. Par. 41.11 (2); Fed. Proc., L. Ed. Sec. 62:504; "Involuntary Dismissal for Disobedience or Delay: the Plaintiff's Plight", 34 University of Chicago Law Review 929 (1966). Even if it can be argued that the Plaintiff should be held responsible for the actions of his counsel, this rule should apply in situations where the attorney is in the course of preparation and trial of a case. It is inconceivable that counsel's act of abandonment of the Plaintiff should result in Court sanctions. While the Court concluded that the attorney's action was the

Plaintiff's fault (App., p. 19), the Plaintiff disagrees.

Perhaps the inherent power of a District Court to dismiss a case does not require notice and hearing (Link v. Wabash R.R. Co., supra, 370 U.S. 626, but the Court qualified this by its statement that "the adequacy of notice and a hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the circumstances of his own conduct." Link, supra, 370 U.S. at 632. See also Saylor v. Bastedo, 623 F. 2d 230, 238 (2nd Cir. 1980).

Certainly, in the present case, the withdrawal of Hirsch was unanticipated by both Plaintiff and his remaining counsel. A hearing on the dismissal is warranted under the instant circumstances. In Link,

where Justice Black found it unfair to charge a Plaintiff with notice that failure to attend a pre-trial conference would result in dismissal (Link, supra, 370 U.S., n. 10, at 642) this Plaintiff is being charged with notice that withdrawal of an attorney would result in dismissal, and he was never afforded the opportunity to attend the pre-trial conference. Fundamental fairness dictates the necessity of a hearing for the Plaintiff to attempt to explain the reasons for the conduct which has provoked the Court's dismissal. See generally, Fed. Proc. L. Ed., Sec. 62:504; 5 Moore's Fed. Prac. Sec. 41.11 (2), p. 41-158. This is especially important when it may well result that there will be no dismissal where the situation is satisfactorily explained. Kuzma v. Bessemer & Lake Erie R.R., 259 F. 2d 456 (3rd Cir. 1958).

Finally, even if it is to be shown that the Plaintiff was charged with the actions of his counsel under these circumstances, it was an abuse of discretion of the trial Court not to consider less drastic sanctions. Dismissal with prejudice is an extreme measure, and must be carefully considered (Asociacion de Empleados v. Rodriguez Morales, 538 F. 2d 915, [1st Cir. 1976]; Richman, supra, 437 F. 2d at 199; see also, Durgin v. Graham, 372 F. 2d 130, 131 (5th Cir. 1972), and failure to do so should result in reversal (Reizakis, supra, 490 F. 2d, at 1135, citing Richman, supra, 437 F. 2d at 199; Flaska, supra, 389 F. 2d at 887; Dyotherm, supra, 392 F. 2d, at 148).

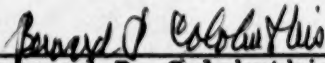
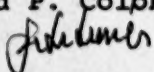
Lesser sanctions to be considered include a warning, a formal reprimand, placing the case at the bottom of the list, a fine, the imposition of costs or attorneys

fees, the temporary suspension of counsel from practice before the Court, and dismissal of the suit unless new counsel is secured. Zavala Santiago v. Gonzales Rivera 553 F. 2d 710, n. 1 at 712 (1st Cir. 1977); Richman, supra, 437 F. 2d, 4 at 199; Reizakis, supra, 490 F. 2d at 1134-1135; Pond v. Braniff Airways Inc., 453 F. 2d 347 (5th Cir. 1972); 5 Moore's Fed. Proc. Par. 41.11 (2), at 41-145. Additionally, the Court could have suggested a "conditional dismissal" (see "Involuntary Dismissal for Disobedience or Delay: the Plaintiff's Plight", 34 Univ. of Chicago Law Rev. 922, 929 [1966]; Waterman, "An Appellate Judge's Approach in Reviewing District Court Sanctions Imposed for the Purposes of Insuring Compliance with Pretrial Orders", 29 F.R.D. 420 [1961]) or have allowed the case go to trial as scheduled.

In conclusion, the Court's abuse of discretion has resulted in the abrogation of the substantive right of the Plaintiff to seek redress in the Courts. It is important that, in like cases, the Plaintiff be afforded notice and hearing should the Court hold him completely responsible for all actions of his counsel. Definite guidelines should be set to determine the proper sanctions to be imposed by the trial Courts to avoid capricious dismissals of important cases sua sponte.

CONCLUSION

WHEREFORE the Petitioner respectfully prays that a writ of certiorari be granted.


Bernard P. Colokathis,


THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Bernard F. Colokathis

v. #C77-352-L

Wentworth-Douglas Hospital, et al.

ORDER DISMISSING CASE ON COURT'S OWN MOTION

Appended to the order is a copy of the docket markings from the date of the filing of the complaint November 3, 1977 to February 4, 1982. This case has been on the docket as of today's date 1,615 days. The case has been specially assigned as the number one jury case to commence April 27, 1982. In fact this court importuned the Superior Court of New Hampshire the week of March 29, 1982 to continue a very important state case because one of the attorneys involved in this case, Edward Kaplan had a conflict concerning trial dates.

To add further impetus to what might

at first blush appears to be a Draconian order of a rhadamanthine judge is a quote from a recent order of the court dated December 31, 1981.

ORDER ON MOTION TO WITHDRAW ORDERS

Motion denied. The court has stated on the record its reasons for denying said motion. They are that this case has been on the docket for an interminable period of time, the plaintiff keeps hiring and firing attorneys whenever the case is set for trial and it would be inequitable to subject the defendants to further depositions because present counsel may feel that past counsel were incorrect or failed to depose said witness completely.

December 30, 1981.

Quoting partially from a court order of November 13, 1981 which is directly germane to the dilatory tactics of the plaintiff.

This court finds itself confronted with yet another procedural brouhaha in this overly protracted

litigation, and thus yet another step away from trial. At issue now, succinctly stated, are plaintiff's motions to withdraw orders denying his motion for further discovery and to proceed without local counsel.

Plaintiff has been represented by seven separate counsel, both concurrently and consecutively, since this action was first initiated. Plaintiff's present counsel, Leon Hirsch, filed a formal appearance on July 24, 1981. He had been involved with the case prior to that time, however, having attended a pretrial conference held January 21, 1981. Mr. Hirsch was disappointed with the discovery obtained by his predecessors and desired further discovery. We quote from the court's order of September 11, 1981

Mr. Hirsch officially entered this case on January 15, 1981 when he participated in a further pretrial which was held on that date. He advised the court that he would

complete his review of the Glasberg file and advise the court and parties what further discovery would be necessary by March 16, 1981. The parties agreed to meet together and attempt to arrive at a discovery schedule without the need of a further pretrial. (See Order dated January 20, 1981.) This time was extended to July 31, 1981 on the basis of a Motion to Enlarge Time to Request Further Discovery file by Mr. DePuy and granted on March 24, 1981. By letter dated May 22, 1981, Mr. Hirsch pointed the discovery he desired to pursue under Rule 26. On June 11, 1981 Judge Loughlin advised counsel that no further continuances would be granted in the case. By letter date June 10, 1981, Mr. Van Loan advised in no uncertain terms that " . . . I for one do not intend to voluntarily provide him (Mr. Hirsch) with anything of the kind." referring to the May 22, 1981 letter. Defendant Neff on June 19, 1981 moved to have the Court prohibit further discovery. Plaintiff timely objected to the Neff motion on June 26, 1981. By letters dated June 26, 1981 and July 1, 1981 both Mr. Van Loan and Mr. Kaplan requested a further pretrial for the purpose of discussing discovery in light of Mr. Hirsch's letter of May 22, 1981 and trial date of December 7, 1981. At the request of both plaintiff's and defendant's counsel, because of their vacation schedules, said pretrial was continued until September 10, 1981.

An attorney's lien has been filed by Attorney Arpiar Sauders and Victor M. Glasberg. See docket number or entry 249.

The defendants in this action have incurred costly legal expenses and their attorneys frustration with the dilatory tactics of the plaintiff.

The court, which in this case includes the labor of two judges and a magistrate has been subjected to a nugatory description of judicial time and economy where its docket has increased over 70%. As of today's date, the court has 474 cases assigned to him.

Reference is made to Mederios v. United States, 621 F.2d 468 (1st Cir. 1980)

While dismissal with prejudice is a severe sanction, at times it becomes necessary.

A district court unquestionably has the authority to dismiss a

case undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. See Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); 9 Wright & Miller, Federal Practice and Procedure Sec. 2370 at 199. Because of strong policy favoring the disposition of cases on the merits, see Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971), we, and federal courts generally, have frequently warned that dismissals for want of prosecution are drastic sanctions, which should be employed only when the district court, in the careful exercise of its discretion, determines that none of the lesser sanctions available to it would truly be appropriate. See Asociacion de Empleados v. Rodriguez Morales, 538 F.2d 915 (1st Cir. 1976); Richman v. General Motors Corp., *supra*. See also Durquin v. Graham, 372 F.2d 130, 131 (5th Cir. 1972). But we have not hesitated to affirm dismissals of suits for want of prosecution in the appropriate cases. See Pease v. Peters, 550 F.2d 698 (1st Cir. 1977); Asociacion de Empleados v. Morales, *supra*; cf. Luis Forteza e Hijos, Inc. v. Mills, 534 F.2d 415 (1st Cir. 1976)."

The complaint states alleged courses of action commencing as far back in

time as 1975 and 1976. Regardless of the voluminous discovery and depositions after seven years mnemonics would be needed by all to try this case. To allow the plaintiff to take advantage of New Hampshire Rule 6 is once again to put this case at least two years down the road while new counsel becomes familiar with the voluminous file.

Enough is enough. The case is dismissed with prejudice.

April 6, 1982

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Michael O'Shaughnessy, Esq.
Edward M. Kaplan, Esq.
Leo N. Hirsch, Esq.
Eugene M. Vanloan, Esq.
Charles A. Meade, Esq.
Bernard F. Colokathis,
Charles Philamore Bailey, Esq.
Joseph P. Nadeau, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 82-1410

BERNARD P. COLOKATHIS,

Plaintiff, Appellant,

v.

WENTWORTH DOUGLASS HOSPITAL, ET. AL.,

Defendants, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

(Honorable Martin C. Loughlin,
U.S. District Judge.)

Before
Coffin, Chief Judge

Timbers, of the Second Circuit,
sitting by designation,
Senior Circuit Judge.

and Breyer, Circuit Judge.

Charles A Meade, with whom Stephen
Fine and Associates, P.A. was on brief, for
appellant.

Charles M. Larsen, with whom Eugene Van Loan, III, A.J. McDonough, and Sulloway, Hollis and Soden were on brief, for appellee.

November 15, 1982

COFFIN, Chief Judge. Bernard Colokathis appeals from an order of the District Court of New Hampshire dismissing his complaint for want of prosecution. After hearing oral argument from the parties and carefully reviewing the record, we conclude that the district court was within the proper exercise of its discretion in dismissing the case.

The case has a long history. We rehearse here only the highlights. Plaintiff filed his complaint in November of 1977. Extensive discovery was conducted by plaintiff's first trial counsel and a trial date was set for June 9, 1980. On May 6, 1980, the case was continued on the court's own motion and the trial date was changed to December 29, 1980. On September 24, 1980, plaintiff's counsel withdrew, citing serious and irreconcilable dif-

ferences with the plaintiff. There followed a parade of new counsel for the plaintiff, totalling at least seven by May of 1982.¹ One of the new counsel, David DePuy, entered on December 10, 1980. Because he "had not had an opportunity to review all of the pleadings and discovery compiled to date", he asked for and was granted a continuance in the trial from the scheduled December 29, 1980 date to December 7, 1981.

On January 15, 1981, another new counsel, Leo Hirsch, appeared on behalf of the plaintiff. He advised the court that he expected to be able to review the file of approximately 4,000 to 5,000 pages within six weeks of receiving it. The court gave him until March 16, 1981 to notify the court and parties what further discovery would be necessary to prepare the plaintiff's

case for trial. On March 11, 1981, the plaintiff reported to the court that it was "impossible to complete the review of the file in a thorough manner so as to be able to decide what additional discovery might be required by March 16, 1981." The court granted an extension to July 31, 1981. On May 22, 1981, attorney Hirsch outlined his requested discovery and defendants objected. On June 11, 1981, the court announced that the case would take priority on his calendar and that "[n]o further continuance will be granted." At a hearing on September 11, 1981, the trial judge expressed his concern over "the lack of any discovery since my Order of January 20, 1981, and the close proximity of final pretrial on November 20, 1981 and trial date of December 7, 1981" and ordered a September 11, 1981 cutoff for plaintiff's additional

discovery requests and an October 8, 1981 hearing on discovery objections.

On September 16, 1981, plaintiff's local counsel withdrew. Plaintiff failed to appear at the discovery hearing, held on October 9, and the court denied the discovery requests. On October 21, 1981, attorney Hirsch moved to have the October 9 orders withdrawn, arguing that they amounted to a denial of due process.

On October 28, 1981, new local counsel appeared and moved to continue, arguing that attorney Hirsch had not received notice of the October 9 hearing and that "at the very best the discovery conducted by plaintiff's previous trial counsel was inadequate." On November 13, 1981, the trial judge denied the motion to withdraw the October 9 orders, denied all further discovery and all further

continuances, "absent the most exigent of circumstances", and ordered that "this case will proceed to trial as presently scheduled, or it will be dismissed with prejudice." Because of the trial judge's illness, the trial date was changed again, to April 27, 1982. The final pretrial conference was scheduled for April 8, 1982.

On April 2, 1982, attorney Hirsch withdrew, citing "irreconcilable differences" with the plaintiff over the payment of legal fees and the conduct of the case. On April 6, 1982, the court dismissed the case. The court noted the dilatory tactics of the plaintiff, the cost to the defendants, the waste of judicial resources and the probability of further delay. Plaintiff's local counsel moved to reinstate the case, assuring the court that he was ready, willing and able to proceed with

the case as scheduled. The court denied the motion.

On appeal, plaintiff argues that the court abused its discretion by not considering less drastic sanctions than dismissal and by not waiting until the date set for trial to determine whether the latest change in counsel would result in further delay of the case. He also asserts that he should have had notice and a hearing prior to the dismissal of his case or at least an opportunity to explain to the court the reasons for the actions that provoked dismissal. We disagree.

We have had several occasions recently to rehearse the standards for dismissal, under Fed. R. Civ. P. 41(b), for want of prosecution. As we noted in Medeiros v. United States, 621 F.2d 468, 470 (1st Cir. 1980) (quoting Zavala Santiago v.

Gonzalez Rivera, 553 F.2d 710, 712 (1st Cir. 1977)):

"A district court unquestionably has the authority to dismiss a case undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. See Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); 9 Wright & Miller, Federal Practice and Procedure Sec. 2370 at 199. Because of strong policy favoring the disposition of cases on the merits, see Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971), we, and federal courts generally, have frequently warned that dismissals for want of prosecution are drastic sanctions, which should be employed only when the district court, in the careful exercise of its discretion, determines that none of the lesser sanctions available to it would truly be appropriate. See Asociacion de Empleados v. Rodriguez Morales, 538 F.2d 915 (1st Cir. 1976); Richman v. General Motors Corp., *supra*. See also Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1972). But we have not hesitated to affirm dismissals of suits for want of prosecution in the appropriate cases. See Pease v. Peters, 550 F.2d 698 (1st Cir. 1977); Asociacion de Empleados v. Morales, *supra*; *cf.* Luis Forteza e Hijos, Inc. v. Mills, 534 F.2d 415

(1st Cir. 1976)."

This was an appropriate case for dismissal. The court had endured four and a half years of delay and confusion, contributed to by at least seven different attorneys for the plaintiff. It had repeatedly warned that no further delay would be countenanced. In light of the prior requests for continuances to give new counsel the opportunity to familiarize themselves with the voluminous record and the fact that local counsel, prior to the withdrawal of attorney Hirsch, apparently had little involvement in the conduct of trial preparation, the district court was warranted in concluding that the most recent changing of the guard could only signal further delay. We see no reason why the court and the defendants should have

been put to further trial preparation expense that would have been required had the court waited to dismiss the case when the plaintiff actually requested further delay.

As the plaintiff points out, we have counseled in other cases that the court should consider less drastic sanctions than dismissal. See Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 (1st Cir. 1977) (suggesting sanctions such as a warning, a formal reprimand, placing the case at the bottom of the calendar list, a fine, the imposition of costs or attorney fees, and the temporary suspension of the counsel from practice). Here we see no less drastic sanction that would have served to prevent the further delay and harassment of the court and the defendants that the court's order sought to avoid.

Nor are we persuaded that the plaintiff was entitled to notice and a hearing before the court dismissed the case. The Supreme Court has made clear that "when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting." Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962). See also Corchado v. Puerto Rico Marine Management, Inc., 665 F.2d 410 (1st Cir. 1981).

In light of the fact that the plaintiff's problems are apparently due largely to his own inability to get along with his counsel, with the result that after four and a half years the case was still not prepared for trial, and of the court's repeated warning that further delay

would result in dismissal of the case, we cannot say that there was any unfairness to the plaintiff in the fact that he was not afforded one final opportunity to try to persuade the court that the history of delays would not be repeated.

The judgment of the district court is affirmed.

FOOTNOTES.

1. There is some confusion as to the exact number of attorneys. Plaintiff counts ten, five local counsel and five out of state counsel, but his count includes two attorneys who may never have formally appeared in the action. In any case, seven are enough.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT
OF NEW HAMPSHIRE

Bernard P. Colokathis

v. #C77-352-L

Wentworth Douglass Hospital
John L. Beckwith, William
Cusack, Jr., Roger C. Temple,
H. Jack Meyers, and John Neff

ORDER ON MOTION TO VACATE ORDER OF
DISMISSAL AND REINSTATE FOR TRIAL

On March 2, 1982, this court was in
Florida on vacation. The Clerk of Court
followed local rule 6(d). Attorney Meade
was local counsel in accordance with local
rule 6 (b) and never indicated he was trial
counsel. Motion denied.

April 14, 1982

/s/Martin F. Loughlin
Martin F. Loughlin
U. S. District Judge

Charles A. Meade, Esq., Eugene M. Van Loan,
III. Esq., Joseph P. Nadeau, Esq., Martin L.
Gross, Esq., A. J. McDonough, Esq.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis, M.D.,

v. #C77-352-L

Wentworth-Douglass Hospital, et al.

ORDER

The Court rules as follows on the plaintiff's motion for default judgment. Motion denied.

The Court rules as follows on the plaintiff's motion for alternative relief. Granted as to immediate compliance with all discovery proceedings consistent with the Court's later orders hereinafter set forth. The remainder of plaintiff's requests in the alternative are denied including costs of the plaintiff's motion.

As the Court stated on the record, the order of William H. Barry, Magistrate, is hereby reaffirmed relative to the taking

of Dr. Colokathis' deposition.

The Court considers this to be a very important case as far as all parties are concerned. It is evident from the voluminous files and judge time so far necessitated in this case that counsel are being obdurate and making or attempting to make a travesty of the discovery process. Counsel are hereby notified that this case will be closely monitored by this Judge as it has been assigned to him. Therefore, the following orders will be strictly adhered to under the threat of sanctions.

1. All discovery shall be completed on or before October 1, 1979.

2. By discovery, the Court means depositions shall be completed by October 1, 1979. It is the Court's understanding that the deposition of the plaintiff has been taken at least six times and that Drs. Neff,

Cusack, Young, Kennedy, Randall, Temple, and Myers have been taken on one or more occasions. Mr. John L. Beckwith's deposition has been taken. A deposition was taken in Ohio, there were three days of depositions in June--June 19 through the 21st and again on May 17 and 18th, 1979.

3. This case shall be ready for pre-trial sometime in October, 1979 unless for good cause shown, shall be tried in January or February of 1980. In the future, counsel for the plaintiff shall have local counsel with him on any court hearing or to co-sign any further memos that may be filed in this Court.

SO ORDERED,

June 22, 1979

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

CC Victor M. Glasberg, Esq.
Eugene Van Loan III, Esq.

Edward M. Kaplan, Esq.
John P. Shea, Esq.
A.J. McDonough, Esq.
Apiar G. Saunders, Esq.

THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis,

v. #C77-352-L

Wentworth-Douglas

Hospital, et al.

ORDER ON MOTION TO CONTINUE

PRETRIAL AND TRIAL

Motion granted. Case will be assigned at the call of the list on Friday,
December 19, 1980 at 10 A.M.

December 11, 1980

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

R. David DePuy, Esq.
Edward Kaplan, Esq.
A.J. McDonough, Esq.
Eugene Van Loan, Esq.

THE UNITED STATES DISTRICT COURT FOR
DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis, M.D.

v.

#C77-352-L

Wentworth Douglass Hospital, et. al.

ORDER ON MOTION FOR PLAINTIFF TO HAVE
LOCAL COUNSEL

Motion granted. Plaintiff must have local counsel file an appearance on or before November 2, 1981 or the case will either be dismissed or the plaintiff shall try the case pro se. If the plaintiff does not have local counsel, he shall notify the court that he is appearing pro se on or before November 2, 1981.

October 9, 1981.

/s/Martin F. Loughlin
U.S. District Judge

Honorable Joseph P. Nadeau, Dr. Bernard P. Colokathis, Kenneth G. Bouchard, Esq., Leo N. Hirsch, Esq., Eugene Van Loan, Esq., Edward M. Kaplan, Esq.

THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis, M.D.

v. #C77-352-L

Wentworth Douglass Hospital, et al.

ORDER RELATIVE TO NOTICE OF DEPOSITION,
OBJECTIONS THERETO

Latest counsel for Plaintiff Bernard P. Colokathis, M.D., Leo N. Hirsch, filed on October 5, 1981 a notice of deposition to be taken on October 22, 1981. Counsel for defendants, Neff, Cusak, Jr., Temple, Molori and Wentworth Douglass all objected to the Notice of Deposition,

Defendants counsel were all present at a hearing on these motions on October 9, 1981 at 9:00 A.M. Plaintiff's counsel failed to appear.

The gist of defendants objections were that it would be inequitable to

redepose their respective clients because extensive depositions have been taken by plaintiff's prior attorneys. The assertions of defendant's counsel are correct and the court agrees with their contentions.

This case as of today's date has been on the docket for 1,435 days and is the fourth longest case in time that has not been reached for trial.

The court is listing from the 269 docket entries, the history of counsel representing the plaintiff which includes their appearances and subsequent withdrawals.

C77-352-L filed 11/3/77

269 Docket Entries

11/3/77 Complaint filed, Raymond P. Blanchard, Esq. (local counsel) Flynn, McGuirk & Blanchard

and

Victor M. Glassberg, Philip J. Hirschkop,

Hirschkop & Grad, P.O. Box 1226, Alexandria,
VA 22313

9/15/77 Blanchard withdrew, Arpiar G.
Saunders substituted as local counsel
9/7/78

10/29/80 Atty Alfred Catalfo, Jr. appears

11/17/80 Atty. Alfred Catalfo, Jr. with-
draws

12/10/80 Atty's lien filed---RSA 311:13,
Saunders and Glasberg

10/8/80 Glassberg & Saunders withdrew

12/10/80 Appearance R. David DePuy,
McLane, Graf, Raulerson & Middleton

12/22/80 Atty Charles P. Bailey of
Otterbourg, Steindler, Houston and Rosen
P.C., N.Y., N.Y. filed appearance

12/31/80 Appearance by Leo N. Hirsch of
Hirsch & Wolfe N.Y., N.Y.
1/23/81

7/24/81 Atty Wolff of Otterbourg firm
withdraws

9/21/81 Attorney DePuy of McLane, Graf,
Raulerson & Middleton withdraws

This case was originally assigned
to Bownes, J. prior to his elevation to the
First Circuit Court of Appeals. This

court's first contact with the case was on his appointment in May of 1979. A vigorous presentation was made by Attorney Glassberg prior to his withdrawal on December 8, 1980 and the court had innumerable hearings as did Magistrate William H. Barry, Jr. It appears that whenever the case is ready for trial, new counsel appears and decides to commence the action anew. This has been a matter of concern, not only to the court, but also to opposing counsel and their clients and the resulting expense to them. Therefore, it is the order of this court that the case shall be tried commencing December 7, 1981. If the plaintiff discharges present counsel, the case will go on regardless of this fact.

The plaintiff will appear pro se or otherwise the case will be dismissed with prejudice.

October 9, 1981

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Bernard P. Colokathis, M.D.
Kenneth G. Bouchard, Esq.
Leo N. Hirsch, Esq.
Eugene VanLoan, Esq.
Edward M. Kaplan, Esq.
Honorable Joseph P. Nadeau

THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis

v. #C77-352-L

Wentworth-Douglass Hospital, et al.

ORDER ON MOTION TO DISMISS

Dover v. Wentworth Douglas Hospital

does hold that the City of Dover has limited control over the hospital, but the decision is based solely on a statutory construction.

The court wrote:

It follows that the question of whether the city council may compel the hospital board of trustees to include in their annual report to the council a list of the individual salaries of the hospital employees is governed not by ownership, but by the special statutes involved.

114 New Hampshire at 125-126. The court then examined the applicable statutes (1905 N.H. Laws, Chapter 162; 1913 N.H. Laws Chapter 303; 1947 N.H. Laws Chapter 402; 1949 N.H. Laws Chapter 430 VI; 1953 N.H. Laws

358 Paragraph 16, 1963 N.H. Laws Chapter 425) and concluded, as defendants argued, that the control by the City of Dover is limited to five areas: 1) appointment of trustees; 2) removal of trustees for cause; 3) ex officio membership on the board of trustees; 4) appropriation of funds; 5) receipt of the annual report. But while the legislature did not vest total control over the hospital in the City of Dover, this does not preclude a finding of state action. The legislature gave the powers not given to the city to the Board of Trustees. As applicable herein, 1905 N.H. Laws Chapter 162 provides

Said board of hospital trustees . . . may employ and fix the compensation of such agents as they shall deem expedient, and remove any of said agents at pleasure, and make necessary rules and regulations for their own government . . .

The statute in effect at the time

this cause of action arose was 1953 Laws Chapter 358 Sec. 16, which provides in pertinent part,:

Said board of hospital trustees may appoint a hospital director, and such employees as they shall deem expedient and fix their compensation, and may remove said officers and employees and make necessary rules and regulations for their own government and for the control and management of all property, real or personal, connected with said hospital, not inconsistent with the merit plan ordinance adopted by the city council.

Whether the state acts through a municipality or through a board of trustees, it is still the state which is acting. Gilmore v. City of Montgomery, 417 U.S. 556 (1979) teaches that the state does not escape constitutional responsibilities for its actions by acting through a superficially private entity. That case involved a transfer of recreational responsibilities from city facilities which were closed

in reponse to a desegregation order to the YMCA, which continued the segregated recreation practice the city could not. While that case involved an intent to circumvent a desegregation order and evade constitutional requirements that are not present here, this distinction does not vitiate the court's ruling that

This proscription on state action applies de facto as well as de jure because "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action". Evans v. Newton, 382 U.S. 296, 299 (1966).

The form of entity the state chooses as its agent to implement its policy has no bearing on the state's ultimate responsibility for the actions of its agents.

As state action is direct here, there is no need to find a nexus. But the

nexus is readily established in any event. Defendants argue that the state action inquiry has moved from a "sifting of facts and weighing of circumstances theory of Downs v. Sawtelle, 574 F.2d 1 (1st Cir 1978) to a state-private actor partnership in Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981), cert. filed, No. 80-2102, 50 L.W. 3083 (June 12, 1981). If there has been such a shift in the legal theories underlying a finding of state action, it is more form than substance. Where Downs court sifted factors to indicate state action, the Rendell Baker court sifted essentially the same factors to show an intertwined relationship. That intertwined relationship in turn shows state action. The Downs court also discussed the Rendell Baker rationale, stating:

The essence of Burton which

Although we do not presume to establish the "precise formula" which the Supreme Court has declined to fix, we think it possible to identify certain factors which have tended to weigh heavily in findings of such a relationship.

641 F.2 at 23. The court then identified four factors as indicative of past findings of an intertwined relationship; those factors will be examined seriatim in the context of this case.

The first factor indentified is the use of public property. The court identified this as "the strongest factor" indicating the intertwined relationship in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), Gilmore v. City of Montgomery, supra and Fortin v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975). In this case the Wentworth Douglas Hospital, although constructed with private funds, has been presented to and accepted by the

survives Jackson is that the relationship between the state and the private institution may be so intertwined that the state will be held responsible for conduct of the institution with which it had no direct connection.

574 F.2d at 9. The court quoted from Holodnak v. Avco Corp., 514 F.2d 285, 288 (2nd Cir. 1975) that the Supreme Court

. . . recognized the continued viability of the principle enunciated in Burton v. Wilmington Parking Authority . . . and Moose Lodge . . . that where the state goes beyond mere regulation of private conduct and becomes in effect a 'partner' or 'joint venturer' in the enterprise, the inference of state responsibility for the proscribed conduct could more easily be made." Holodnak v. Avco Corp., Avco-Looming Div., Stratford, 514 F.2d 285, 288 (2d Cir. 1975) (suit under Sec. 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185).

Ibid. This is the point that the Rendell Baker court began. Rendell Baker stated:

The more difficult problem, of course, is to decide what constitutes such an "intertwined relationship.

City. 1963 N.H. Laws Chapter 425, fourth "Whereas" clause, 1905 N.H. Laws Chapter 162, Sec. 1. While the exact nature of the title may be open to question, see, generally, United States v. Certain Land in City of Portsmouth, 247 F. Supp. 932, 934 (D.N.H. 1965); 23 Am Jur Dedication Sec. 56 (Lawyers Co-op 1965), for the purposes of this action the buildings belong to the city. Additionally, the City of Dover was charged with responsibility for the construction and maintenance of the physical plant. 1905 N.H. Laws Chapter 162, Sec. 1; 1963 N.H. Laws Chapter 425, Sec. 2. Clearly, the hospital is owned by the city.

The second factor the Rendell Baker court discussed was the appointment of the trustees by the town Board of Selectmen. The court indicated that this was the most significant factor in its finding of state

action in Downs v. Sawtelle, supra. "In such a situation, every decision made by the nominally private entity may fairly be attributed to the state, since the decision makers derive their authority from the state." 641 F.2d at 23. Here, the City of Dover not only has the power of appointment, it has the additional power of removal for cause. 1905 N.H. Laws Chapter 162; Dover v. Wentworth Douglas Hospital, supra.

The third factor discussed is the state's representation of the relationship between it and the entity in issue. The court discussed Powe v. Miles, 407 F.2d 73, 81 (2nd Cir. 1968) and Braden v. University of Pittsburg, 522 F.2d 948, 974 (3rd Cir. 1977):

In each of those cases, the state legislature had passed a statute indicating the nature of the state's relationship to the university involved. In the Pittsburg

case, the statute specifically declared that one university to be state-related, and it changed the school's name to indicate the state's role. In Powe v. Miles, New York statutes designated the state contract colleges as integral parts of the state university and referred to the private university which housed the contract college in question as "the representative of the state university trustees." *Id.* at 83. These cases indicate that where a state expresses its own understanding that an institution is under its control and subject to its constitutional obligations, these expressions may be given great weight.

In the instant case, there are numerous indicia that Wentworth Douglas was viewed by the state as a municipal hospital. 1963 N.H. Laws Chapter 425 provides, as pertinent herein, "Whereas said hospital, since 1949, has been known as the Wentworth Hospital, the Wentworth-Dover Hospital, and the Wentworth-Dover City Hospital;" (emphasis added). Section 1 of that act provides "the official and legal name of the Dover

municipal hospital shall be Wentworth Douglas Hospital". (emphasis added). Section 2 provides "The City of Dover is also authorized to construct and do and perform any and all acts necessary to establish and maintain the Wentworth-Douglas Hospital as a hospital for the city." (emphasis added). While the New Hampshire Supreme Court did not answer the question of title in Dover v. Wentworth-Douglas Hospital Trustees, supra, relying instead on statutory authority, its language is not inconsistent with the legislature's interpretation of the city-hospital relationship discussed above. The court wrote:

The plaintiff claims that the city owns the hospital and that the trustees are their agents obligated to carry out such directions as may be given them by the city council. The city relies upon Kardulas v. Dover, 99 N.H. 359, 111 A.2d 327 (1955), where it was held that the city was liable for negligence in the operation of the

hospital. While the trustees were not parties to that action and the question decided was that the city's operation of the hospital was proprietary rather than governmental that decision lends credence to the proposition that the city has legal title to the hospital.

Judge Lampron, writing for the Kardulas court, was less unsure of the relationship. He indicated at 99 N.H. 359 and 362 that Dover was the operator of the hospital.

The final factor identified in Rendell Baker is an intention to evade the constitutional requirements, citing Evans v. Newton, 382 U.S. 296 (1966) and Gilmore v. City of Montgomery, supra. While those cases are more egregious factually than is this, the lesson to be applied here is that the form of the entity the state selects to act is immaterial where the state is acting. The state acts as surely by delegating power to a Board of Trustees, see 1905 N.H. Laws

Chapter 162, Sections 2 and 3, as it does by delegating the power to a municipality.

The defendants herein argue that all of the above is inconclusive in light of the requirement in Rendell Baker of a finding of actual control by the state over that portion of the hospital's operation that allegedly violates constitutional requirements, i.e., the credentialing process. This actual control argument was discussed in the context of the potential for state control existant in a situation where almost all of a private entity's funding is from the state. The court concluded that this no more makes a private school a state actor than do large defense contracts make a General Agency a branch of the Federal Government. 100% state funding and a potential for control is not enough to show state action, 100% and actual control

is required. But the overall decision rests upon a failure to demonstrate the existence of the four factors discussed above. The court wrote that the funding issue demonstrated a close relationship between state and school, but one short of the intertwined relationship necessary to final state action. The Rendell Baker court summarized:

The school's funding, regulation, and function all show a relationship of close cooperation with the state. But these factors, together as well as separately, do not demonstrate that the state has so dominated the school as to make all the school's actions, and particularly those related to personnel, attributable to the state. The school's management by a private Board of Directors on which the state is not represented, and the broad range of independent discretion which these directors appear to exercise, particularly in personnel matters, belie the notion of state domination.

641 F.2d at 27. In contrast to the school in

Rendell Baker, all four of the factors characterized by the Rendell Baker court as "factors which have tended to weigh heavily in findings of such a relationship", are present in this case. They compel a finding of state action.

Prior decision of Watson, J. re-affirmed.

December 28, 1981

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Leo N. Hirsch, Esq.
Charles Philamore Bailey, Esq.
Charles A. Meade, Esq.
Joseph P. Nadeau, Esq.
Edward M. Kaplan, Esq.
A.J. McDonough, Esq.
Eugene M. Van Loan, III, Esq.

LIST OF DOCKET ENTRIES OF DEFENDANTS'
OBJECTIONS TO PLAINTIFF'S MOTIONS
FOR DISCOVERY

38. "Opposition of Defendant's Beckwith, Cusack, Neff, Temple and Myers to Plaintiff's Motion for Order Compelling Discovery. 2/1/78

72. "Defendants W-D Hospital, Beckwith & Cusak's Objection to Motion for Order Compelling Discovery. 9/7/78.

73. Defendants Temple & Myers Objection to Motion for Order Compelling Discovery. 9/20/78

105. Objection of Temple to Plaintiff's Motion to Compell Discovery. 11/31/78

111. Objection of W-D Hospital to Plaintiff's Second Request for Production of Documents and Motion for Extension of Time Within Which to REspond. 12/21/78.

121. Defendant W-D Hospital's Objection to Plaintiff's third Request for Production of Documents. 2/12/79.

161. Defendant W-D Hospital's Objection to Plaintiff's Notice of Deposition. 4/30/78

162. Defendant William Cusack's Objection to Plaintiff's Notice of Deposition

163. Defendant Wentworth-Douglass Hospital's Objection to Plaintiff's notice of Deposition to W-D Hospital

171. Defendant's Objection to Plaintiff's Second Request for Production of Documents

184. Temple's Objection to Plaintiff's Request for Production

185. Myers' Objection to Plaintiff's Request for Production

197. Wentworth's Objection to Motion for Leave to Have Hospital Records Examined

204. Defendants Temple and Myer's Objection to Motion for Leave to Examine Hospital Records

205. Defendant Neff's Objection to Motion for Leave to Examine Hospital Records

206. Defendant Hospital's Supplementary Memo in Opposition to Motion for Leave to Examine Hospital Records

235. Defendants Hospital, Beckwith and Cusack's Objections to Plaintiff's Supplementary Interrogatories

239A. Defendant Neff's Objection to Motion to Strike Evidence or to Extend Discovery

241. Defendant Temple's and Myers' Objection to Plaintiff's Motion to Strike Evidence or to Extend Discovery

262. Defendant John Neff's Objection to Further Discovery Extensions

271. Wentworth-Douglass Hospital's Objection to Proposed Notice of Deposition

of Hospital

272. Wentworth-Douglass Hospital's
Objection to Proposed Notice of Deposition
of Vito J. Molori

273. Cusack's Objection to Notice of
Deposition of Cusack

274. Temple's Objection to Notice of
Deposition of Temple

275. Neff's Objection to Notice of
Deposition

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis,
Plaintiff,

v. #77-352-L

Wentworth Douglass Hospital,
et. al., Defendants

AFFIDAVIT OF BERNARD P. COLOKATHIS

NOW COMES Bernard P. Colokathis
Plaintiff in the above captioned matter and
says as follows:

On April 2, 1982 my Attorney, Leon
Hirsch of 420 West 64th Street, New York,
New York 10021 informed me that he had
intended to withdraw as counsel from my
case. I have his Motion to Withdraw
dated April 2, 1982 and have read the
subsequent Court Order of April 6, 1982
wherein my case was dismissed.

Attorney Hirsch's withdrawal was
unanticipated and I did not discharge him

from my services. I do not agree with the statements contained in Attorney Hirsch's Motion to Withdraw relative to a fee dispute. It was my intention to attend the final pre-trial conference scheduled for my case on April 8, 1982. My local counsel of record, Charles A. Meade was also intending to be present. It was my intention on April 2, 1982 to proceed with this case as scheduled and to so inform the Court at the April 8, 1982 pre-trial conference.

/s/Bernard P. Colokathis
Bernard P. Colokathis

STATE OF NEW HAMPSHIRE
COUNTY OF

Personally appeared before me the above named Bernard P. Colokathis and made oath that the above statements provided by him are true and accurate to the best of his information, knowledge and belief.

/s/ Charles A. Meade
Justice of the Peace

DOCKET ENTRIES OF DEFENDANTS' MOTIONS
FOR EXTENSIONS OR ENLARGEMENTS OF TIME

20. Dover Doctors' Park's Motion for Enlargement of time to File Motions or Answer. 11/16/77

21. Defendants' Motion for Extension of Time to File Answers to Interrogatories and to Respond to Request for Production of Documents. 12/20/77

23. Wentworth-Douglass Hospital, Beckwith, Cusack, Temple, Myers, and Neff's Motion for Extension of Time to File Answers to Interrogatories and respond to Plaintiff's First Requests for Production of Documents. 1/9/78

55. Motion of Dover Doctor's Park, Inc. For Extension of Time to File Answers to Plaintiff's First Set of Interrogatories and to Respond to Plaintiff's First Request For the Production of Documents. 4/26/78

84. Defendant Neff's Motion to Extend Time to Answer Interrogatories to December 15, 1978. 10/27/78

111. Objection of Wentworth-Douglass Hospital to Plaintiff's Second Request for Production of Documents and Motion for Extinsion of Time Within Which to Respond. 12/21/78

210. Defendants' Hospital, Beckwith and Cusack's Motion to Extend Time to March 10, 1980 to Respond to Pleadings. 2/15/80

214. Defendant Neff's Motion to Extend Time Within Which to Respond to Pleadings to March 10, 1980. 2/21/80

264. Motion to Continue 8/13/81 Pretrial by Defts Temple & Myers. 7/15/81

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1410

BERNARD P. COLOKATHIS
PLAINTIFF/APPELLANT

V.

WENTWORTH-DOUGLASS HOSPITAL, ET AL
DEFENDANTS/APPELLEES

Motion for Extension of Time
For Which to File
Petition for Rehearing

NOW COMES Bernard P. Colokathis and
moves that the time in which to file a
Petition for Rehearing, filed herewith, be
extended to December 10, 1982.

Respectfully submitted,
Bernard P. Colokathis,
By his Attorneys,
STEPHEN R. FINE & ASSOC., PA

By/s/Charles A. Meade
Charles A. Meade
99 Middle Street
Manchester, N.H. 03101

December 7, 1982

I certify that a copy of the foregoing Motion was mailed this day to Robert M. Larsen, opposing counsel at Sulloway, Hollis & Soden, Concord, N.H.

/s/Charles A. Meade
Charles A. Meade

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1410

BERNARD P. COLOKATHIS
PLAINTIFF, APPELLANT

V.

WENTWORTH-DOUGLASS HOSPITAL, ET. AL.
DEFENDANTS, APPELLEES

PLAINTIFF'S PETITION FOR REHEARING

Bernard P. Colokathis
By his Attorneys
STEPHEN R. FINE & ASSOC., PA
99 Middle Street
Manchester, N.H. 03101
(603) 668-2343

By: Charles A. Meade

**Page Missing from
Filming Copy**

468,470 (1st Circ. 1980); it is submitted that the court did not consider less drastic sanctions which would have counter balanced any concern over delay or harassment of the court and defendants.

The strong policy in favor of hearing cases on their merits must be weighed against prejudice to defendants which may result from plaintiff's attorney's conduct in prosecution of cases. This court pointed out that:

" . . . (w)e have counseled in other cases that the court should consider less drastic sanctions than dismissal. Zavola Santiago v. Gonzalez Rivera, 553 F 2d 710,712 (1st Circ. 1977) (suggesting sanctions such as a warning, a formal reprimand, placing case at the bottom of the calender list, a fine, the imposition of costs or attorney fees, and the temporary suspension of the counsel from practice.) Here we see no less drastic sanction that would have served to prevent the further delay and harassment of the court and the defendants that the court's Order

sought to avoid." (Slip Opinion at p.6)

In the present case the court also stated that: "We see no reason why the court and the defendants should have been put to the further trial preparation expense that would have been required had the court waited to dismiss the case when the plaintiff actually requested further delay." (Slip Opinion at p.6) It is submitted that the court is overly concerned with the possibility of delay and that the speculative assumption that delay was required is not supported by plaintiff's efforts to have the case reinstated and his promise that no delay would result. (See Appendix to Briefs, pp. 556-559) An order requiring plaintiff to post a bond in the amount of estimated costs and fees incurred by defendants from the time the case could have been reinstated to the scheduled trial date could easily have been done and would

have accomplished an objective of nullifying prejudice or expense to the defendants should plaintiff default on the trial date. It is submitted the the court failed to consider an appropriate lesser sanction so that a rehearing should be granted and the case remanded for trial. See Richman v. General Motors Corporation, 437 F. 2d 196 (1st Circ. 1971).

II.

Plaintiff Is Not Responsible For
His Attorney's Conduct Which
Precipitated Dismissal

The Court apparently also gave a great deal of weight to the fact that plaintiff has had seven attorneys appear for him. Numbers alone should not be a factor in determining whether a litigant should be denied a right to prosecute a case. Plaintiff in the present case is not responsible for other than one change of

attorneys - From Attorney Glasberg of Hirschkop and Grad to Attorney Hirsch. All other counsel appeared pursuant to an attorney's request or because Court rules (U. S. District Court Rule 5 (b)) requires appearance of local counsel.

The Court stated during oral argument that it is reluctant to punish an innocent plaintiff because of his attorney's conduct. It is submitted that the record indicates delay was the result of attorney's conduct during discovery and not due to plaintiff's personal lack of interest in the case. Attorney Hirsch appeared for the defendant in January of 1981 and no attempt for further discovery was made until September of 1981, eight months later. The District Court noted his concern over the conduct of the case particularly with regard to lack of discovery since its order of January 20, 1981. (See Appendix p. 475) The Court ordered

Notice of Depositions to be made by plaintiff by September 17, 1981, which was not done. (See Appendix pp. 478-486) The plaintiff in the present case cannot control his attorney's conduct in prosecution of his case and he should not be made to suffer the consequences.

Summary

The court apparently based its decision of November 15, 1982 on an assumption that plaintiff's local counsel was not able to proceed with a trial despite plaintiff's Rule 62 Motion and Affidavit requesting reinstatement for trial and that plaintiff was able to proceed. (See Appendix pp. 556-557). Plaintiff's local counsel had reviewed the extensive court file upon his appearance and was familiar with the pleadings and legal theory of the case having

assisted Attorney Hirsch with pleadings in opposition to defendants' renewed Motions to Dismiss and/or for Summary Judgment.

The Court could have required defendant to appear pro se or to file a bond for the cost of defense upon default. Plaintiff was always personally anxious to proceed to trial in the most expeditious manner and was personally frustrated by delay caused by both the defendants and his counsel.

The plaintiff has suffered from the courts denial of his opportunity to seek redress for the alleged wrongs done to him. In light of the policy in favor of hearing cases on their merits and in applying a sanction less drastic than dismissal, the court should rehear this appeal and apply a more appropriate sanction.

Respectfully submitted,
Bernard P. Colokathis,

By his Attorneys,
STEPHEN R. FINE & ASSOC., PA

By /s/ Charles A. Meade
Charles A. Meade

December 7, 1982

CERTIFICATE OF SERVICE

I, Charles A. Meade, hereby certify that two copies of the foregoing Petition for Rehearing were forwarded to Robert Larsen, Esq., of Sulloway, Hollis & Soden, Concord, N. H., Counsel for defendants on appeal.

Date: December 7, 1982

/s/Charles A. Meade
Charles A. Meade

AFFIDAVIT OF SERVICE

STATE OF NEW HAMPSHIRE
STRAFFORD, SS.

I, the undersigned Bernard P. Colokathis, of 130 Mount Vernon Street, Dover, County of Strafford and State of New Hampshire, depose and say that I am the Appellant herein, and that on ~~Monday~~, March 7, 1983, pursuant to Rule 28, Rules of the Supreme Court, I served THREE (3) copies of the within corrected "Petition for a Writ of Certiorari" on each of the parties required to be served herein:

On Wentworth Douglass Hospital, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Eugene Van Loan III, of Wadleigh, Starr, Peters, Dunn and Kohls, counsel of record, at his office located on 95 Market Street, Manchester, New Hampshire.

On John L. Beckwith, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Eugene Van Loan III, of Wadleigh, Starr, Peters, Dunn and Kohls, counsel of record, at his office located on 95 Market Street, Manchester, New Hampshire.

On William Cusack, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Eugene Van Loan III, of Wadleigh, Starr, Peters, Dunn and Kohls, counsel of record, at his office located on 95 Market Street, Manchester, New

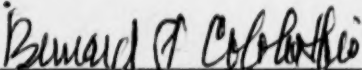
Hampshire.

On Roger C. Temple, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Sulloway, Hollis, and Soden, counsel of record, at their offices located on 9 Capitol Street, Concord, New Hampshire.

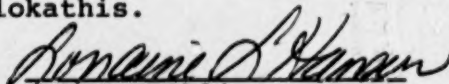
On H. Jack Myers, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Sulloway, Hollis, and Soden, counsel of record, at their offices located on 9 Capitol Street, Concord, New Hampshire.

On John Neff, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to A. J. McDonough & Micheal O'Shaunessy, counsel of record, at their offices located on 99 Stark Street, Manchester, New Hampshire.

All parties required to be served have been served.


Bernard P. Colokathis
Petitioner

Subscribed and sworn to before me, this 8th day of March, 1983, by the said Bernard P. Colokathis.


Notary Public,
My commission expires
10/15/85

No. 82-1500

Office-Supreme Court, U.S.

FILED

APR 7 1983

ALEXANDER L. STEVAS,
CLERK

**In The
Supreme Court of the United States**

APRIL TERM, 1983

BERNARD P. COLOKATHIS,

Petitioner,

v.

**WENTWORTH-DOUGLASS HOSPITAL,
JOHN L. BECKWITH, WILLIAM CUSECK, JR.,
ROGER C. TEMPLE, H. JACK MYERS, AND JOHN NEFF,**
Respondents.

**Brief in Opposition to Petition
for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit**

**Edward M. Kaplan
Robert M. Larsen
(Counsel of Record)
SULLOWAY HOLLIS & SODEN
9 Capitol Street
Concord, New Hampshire 03301
(603) 224-2341**

**Of Counsel:
Eugene Van Loan, III
A. J. McDonough**

Counsel for the Respondents

QUESTIONS PRESENTED

1. Whether this Court should review the district court's decision to dismiss petitioner's case for want of prosecution, where the court of appeals affirmed the district court's exercise of discretion as in conformance with well-settled law, where the case involves no issues of "public significance" or a conflict of opinions among the circuit courts of appeal.

2. Whether this Court should have accepted the Petition for filing, despite its untimeliness, in light of petitioner's failure to timely file a petition for rehearing in the first circuit and his previous delays in this case.

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Table of Authorities	iii
Reasons for Denying the Writ	1
A. This Case Is Not Appropriate For Review Because Petitioner Only Seeks To Vindi- cate His Right To Proceed With Litiga- tion By Obtaining Another Review Of The Circumstances Surrounding The Dismissal For Want Of Prosecution.....	1
1. The power of the district court to invoke the sanction of dismissal for want of prosecution without ad- vance notice and hearing is well- settled	2
2. The courts of appeal uniformly hold that a district court's exercise of this power is discretionary and should be sustained on appeal in the ab- sence of abuse	3
3. The first circuit properly concluded that the dismissal was within the permissible range of the district court's discretion	4
B. This Case Was Not Filed In Time And The Court Should Not Grant An Exception In Light Of Petitioner's Failure To Time- ly File A Petition For Rehearing In The First Circuit And His Previous Delays In This Case	5
C. Conclusion.....	7
Appendix A (Decision of the First Circuit)	1a
Appendix B (Petitioner's Motion for Extension of Time For Which to File Petition for Rehearing) ..	1b
Appendix C (Order of Court Re Motion for Extension of Time)	1c
Appendix D (Respondent's Brief to the Court of Appeals)	1d

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<i>Anthony v. Marion Co. Hosp.</i> , 617 F.2d 1164 (5th Cir. 1980)	4
<i>Arundar v. Staff Builders Temporary Personnel, Inc.</i> , 92 FRD 770 (N.D. Ga. 1982)	3
<i>Beshear v. Weinzapfel</i> , 474 F.2d 127 (7th Cir. 1973).....	3
<i>Chira v. Lockheed Aircraft Corp.</i> , 634 F.2d 664 (2nd Cir. 1980)	3, 4
<i>Chism v. Nat. Heritage Life Ins. Co.</i> , 637 F.2d 1328 (9th Cir. 1981)	3, 4
<i>Corchado v. Puerto Rico Marine Management, Inc.</i> , 665 F. 2d 410 (1st Cir. 1981)	3, 4
<i>Davis v. Operation Amigo, Inc.</i> , 378 F.2d 101 (10th Cir. 1967)	3
<i>Davis v. Williams</i> , 588 F.2d 69 (4th Cir. 1978)...	4
<i>Dyotherm Corp. v. Turbo Machine Co.</i> , 392 F.2d 146 (3rd Cir. 1968).....	3
<i>Forteza e Hijos, Inc. v. Mills</i> , 534 F.2d 415, (1st Cir. 1976).....	4
<i>Harrelson v. U.S.</i> , 613 F.2d 114 (5th Cir. 1980) .	4
<i>Hepperle v. Johnston</i> , 590 F.2d 609 (5th Cir. 1979).....	4
<i>Holt v. Pitts</i> , 619 F.2d 558 (6th Cir. 1980)	3
<i>Layne & Bowler Corp. v. Western Well Works, Inc.</i> , 261 U.S. 387 (1923)	1
<i>Link v. Wabash Railroad Co.</i> , 370 U.S. 626 (1962).....	2, 4
<i>Martin-Trigona v. Morris</i> , 627 F.2d 680 (5th Cir. 1980).....	3, 4
<i>Moore v. St. Louis Music Supply Co.</i> , 539 F.2d 1191 (8th Cir. 1976)	3
<i>Pease v. Peters</i> , 550 F.2d 698 (1st Cir. 1977)	4
<i>Reizakis v. Loy</i> , 490 F.2d 1132 (4th Cir. 1974) ...	3
<i>Rice v. Sioux City Memorial Park Cemetery</i> , 349 U.S. 70 (1954).....	1

	<u>Page</u>
<i>Saylor v. Bastedo</i> , 623 F.2d 230 (2nd Cir. 1980) .	3
<i>von Poppenheim v. Portland Boxing Comm'n</i> , 442 F.2d 1047 (9th Cir. 1971)	4
STATUTES AND RULES:	
Supreme Court Rule 20	5
28 U.S.C. §2101(c)	5
OTHER AUTHORITIES:	
5 Moore's Federal Practice §41.11[2] (2nd Ed. 1982)	3

REASONS FOR DENYING THE WRIT

A. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE PETITIONER ONLY SEEKS TO VINDICATE HIS RIGHT TO PROCEED WITH LITIGATION BY OBTAINING ANOTHER REVIEW OF THE CIRCUMSTANCES SURROUNDING THE DISMISSAL FOR WANT OF PROSECUTION.

This case does not present the Court with either an issue involving "immediate public significance" or an issue involving "a real and embarrassing conflict of opinion and authority between the circuit courts of appeals". *Nice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1954), citing *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Rather, it involves a question of importance only to the petitioner; whether the district court abused its discretion in dismissing his federal complaint for want of prosecution. This question, in turn, requires a review of the circumstances of the case in conformance with well-settled law not in dispute among the circuits, including the power of district courts to dismiss a case for want of prosecution, in the first instance, and the appropriate standard of appellate review. Accordingly, this Court should not grant petitioner another factual review of the circumstances surrounding the dismissal of his federal litigation merely to satisfy petitioner's redundant efforts to vindicate a purely private right.

In fact, the first circuit has already performed this review. (See decision reproduced herein as Appendix A) In a unanimous decision the first circuit affirmed the dismissal of the district court. The first circuit noted that:

"This was an appropriate case for dismissal. The court had endured four and a half years of delay and confusion, contributed to by at least seven different attorneys for the plaintiff. It had repeatedly warned that no further delay would be countenanced. In light of the prior requests for continuances to give new counsel the opportunity to famil-

iarize themselves with the voluminous record and the fact that local counsel, prior to the withdrawal of attorney Hirsch, apparently had little involvement in the conduct of trial preparation, the district court was warranted in concluding that the most recent changing of the guard could only signal further delay. We see no reason why the court and the defendants should have been put to the further trial preparation expense that would have been required had the court waited to dismiss the case when the plaintiff actually requested further delay". (Appendix A at 5a)

The first circuit's decision clearly indicates that petitioner has already been fairly afforded a review of the district court's dismissal, consistent with well-settled law as discussed below.

1. *The power of the district court to invoke the sanction of dismissal for want of prosecution without advance notice and hearing is well-settled.*

Importantly, the first circuit's decision does not raise any unresolved questions about the inherent power of a district court to dismiss a case, *sua sponte*, without advance notice and hearing. In fact, this Court resolved those issues over twenty years ago in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). In *Link*, this Court succinctly stated:

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosecution entered at common law..." *Id.* at 629-30.

Moreover, the Court concluded in this decision that a district court may dismiss a case, *sua sponte*, without advance notice and hearing, and reaffirmed the rule that a party is deemed bound by the acts of his lawyer-agent. 370 U.S. 630-34. Therefore, the Court has already settled, and conversely this

case does not raise, any significant legal questions regarding the district court's use of the sanction.

2. *The courts of appeal uniformly hold that a district courts exercise of this power is discretionary and should be sustained on appeal in the absence of abuse.*

Contrary to petitioner's assertions, the decision of the first circuit does not result in conflict of opinion between the circuit courts of appeal regarding the standard of appellate review. (Petition at 30) Indeed, all eleven circuits apply an abuse of discretion standard with common criteria for judging whether the discretion of the district court has been soundly exercised.¹ In applying the standard, the starting point in making a determination in every circuit is a careful review of the circumstances of the case. Because circumstances differ in every case, the circuits have uniformly held that the proper sanction cannot be automatically or mechanically applied.²

Notwithstanding the lack of precise rules as to what circumstances merit a particular sanction, the circuits have upheld involuntary dismissal in similar cases. Specifically, appellate courts frequently have affirmed dismissal in cases

¹ See e.g., *Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981); *Saylor v. Bastedo*, 623 F.2d 230 (2nd Cir. 1980); *Dyotherm Corp. v. Turbo Machine Co.*, 392 F.2d 146 (3rd Cir. 1968); *Reizakis v. Loy*, 490 F.2d 1132 (4th Cir. 1974); *Martin-Trigona v. Morris*, 627 F.2d 680 (5th Cir. 1980); *Holt v. Pitts*, 619 F.2d 558 (6th Cir. 1980); *Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973); *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976); *Chism v. Nat. Heritage Life Ins. Co.*, 637 F.2d 1328 (9th Cir. 1981); *Davis v. Operation Amigo, Inc.*, 378 F.2d 101 (10th Cir. 1967); *Arundar v. Staff Builders Temporary Personnel, Inc.*, 92 FRD 770 (N.D. Ga. 1982); see also, 5 *Moore's Federal Practice*, §41.11[2] at 41-125 (2nd Ed. 1982).

² See e.g., *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974).

Although the petitioner would have this Court set "definite guidelines . . . to determine the proper sanction to be imposed by the trial courts" (Petition at 30), the circuits have long recognized that an appropriate sanction varies from case to case and depends greatly on the conduct of the litigants. See e.g., *Chism, supra* at 1331.

where plaintiffs have failed to comply with pretrial orders,³ to proceed with discovery or to attend hearings or scheduled conferences,⁴ and where plaintiffs have deliberately proceeded in a dilatory fashion.⁵ Importantly, decisions from the first circuit regarding dismissal for want of prosecution have been in line with the decisions of the other circuits⁶ as well as with this court's decision in *Link*.⁷

3. *The first circuit properly concluded that the dismissal was within the permissible range of the district court's discretion.*

Finally, even a cursory review of the first circuit's decision indicates that the court rejected every contention petitioner now raises before this court. After carefully reviewing the record, the first circuit concluded that petitioner was personally responsible for unwarranted delays, waste of judicial resources, and unwarranted cost to the defendants. (Appendix A at 5a) Moreover, the court concluded that a lesser sanction would not have "served to prevent the further delay and harassment of the court and the defendants that the court's order sought to avoid." (Appendix A at 5a)

³ See e.g., *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664 (2nd Cir. 1980); *Hepperle v. Johnston*, 590 F.2d 609 (5th Cir. 1979); *von Poppenheim v. Portland Boxing Comm'n*, 442 F.2d 1047 (9th Cir. 1971).

⁴ See e.g., *Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328 (9th Cir. 1981); *Harrelson v. U.S.*, 613 F.2d 114 (5th Cir. 1980); *Anthony v. Marion Co. Hosp.*, 617 F.2d 1164 (5th Cir. 1980).

⁵ See e.g., *Martin-Trigona v. Morris*, 627 F.2d 680 (5th Cir. 1980); *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978).

⁶ For instance, in *Pease v. Peters*, 550 F.2d 698 (1st Cir. 1977), the first circuit set out four basic principles involving dismissal for want of prosecution, including: 1) dismissal *sua sponte* is within the inherent power of the court; 2) the exercise of this power is discretionary and should be sustained on appeal in the absence of abuse; 3) dismissal is a harsh remedy and should be used only in extreme cases; and 4) the power of the court to prevent undue delay must be weighed against the policy favoring disposition of cases on their merits. See also, *Corchado v. Puerto Rico Marine Mgmt., Inc.*, 665 F.2d 410, 413 (1st Cir. 1981).

⁷ See e.g., *Pease*, *supra*; *Forteza e Hijos, Inc. v. Mills*, 534 F.2d 415, 418 (1st Cir. 1976).

As the record amply demonstrates, dismissal without notice did not impose an unjust penalty on the petitioner. On this point, the first circuit determined:

"In light of the fact that plaintiff's problems are apparently due largely to his own inability to get along with his counsel, with the result that after four and a half years the case was still not prepared for trial, and of the court's repeated warning that further delay would result in dismissal of the case, we cannot say that there was any unfairness to the plaintiff in the fact that he was not afforded one final opportunity to try to persuade the court that the history of delays would not be repeated."
(Appendix A at 6a)

Accordingly, the first circuit properly affirmed the district court's dismissal of petitioner's case for want of prosecution.

B. THIS CASE WAS NOT FILED IN TIME AND THE COURT SHOULD NOT GRANT AN EXCEPTION IN LIGHT OF PETITIONER'S FAILURE TO TIMELY FILE A PETITION FOR REHEARING IN THE FIRST CIRCUIT AND HIS PREVIOUS DELAYS IN THIS CASE.

Despite the clear requirements of Supreme Court Rule 20 and 28 U.S.C. §2101(c), petitioner failed to file his Petition for Writ of Certiorari within ninety (90) days of the first circuit's decision. Apparently the petitioner, on the advice of counsel, thought he had ninety (90) days from the date of the court's order denying his Motion For Extension of Time for Which to File Petition for Rehearing. (See Petitioner's Motion to Extend Time for Entry of Petition for Certiorari at 3) While this may be an acceptable excuse in some cases, it should not be here in light of previous delays and confusion caused by petitioner.

In large measure, petitioner's failure to file a Petition on time resulted from the late filing of a petition for rehearing in the first circuit. The record clearly demonstrates that petitioner filed the rehearing request after the mandate had issued.

(Appendix B) Although petitioner then moved for an extension of time, the first circuit denied the motion and never reached the merits of the rehearing request. (Appendix C)

The petitioner's inability to make application for a Writ of Certiorari within the time period allotted illustrates his conduct on procedural matters throughout this case. In addition to missing the filing deadlines for the Petition for Writ of Certiorari and for the petition for rehearing, petitioner had previously missed discovery deadlines and a discovery hearing. (Appendix A at 3a) As he has in the past, petitioner attempts to shift the blame for these procedural problems to his counsel. The first circuit, however, rejected this contention on the ground that "plaintiff's problems are apparently due largely to his own inability to get along with his counsel". (Appendix A at 6a)

As a result of this pattern of delay, confusion and excuses, the petitioner has put defendants to additional expense and has wasted even more judicial time. These very reasons prompted the district court to dismiss this case on April 6, 1982. Approximately one year later, and almost five years from the filing of the complaint, respondents confront another review in yet another forum. While respondents do not deny petitioner's right to exhaust his rights of appeal according to the rules of procedure, the rules under these circumstances should be fairly applied to deny review.

C. CONCLUSION

For the reasons stated, the respondents, Wentworth-Douglass Hospital, John L. Beckwith, William Cuseck, Jr., Roger C. Temple, H. Jack Myers, and John Neff, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Edward M. Kaplan

Robert M. Larsen

(Counsel of Record)

SULLOWAY HOLLIS & SODEN

9 Capitol Street

Concord, New Hampshire 03301

(603) 224-2341

Of Counsel:

Eugene Van Loan, III

A. J. McDonough

Counsel for the Respondents

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 82-1410

BERNARD P. COLOKATHIS,

Plaintiff, Appellant,

v.

WENTWORTH-DOUGLASS HOSPITAL, ET AL.,

Defendants, Appellees.

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

[Hon. Martin F. Loughlin, U.S. District Judge]

Before

Coffin, Chief Judge,

Timbers,* Senior Circuit Judge,

and Breyer, Circuit Judge.

*Charles A. Meade, with whom Stephen R. Fine &
Associates, P.A. was on brief, for appellant.*

*Robert M. Larsen, with whom Eugene Van Loan, III, A. J.
McDonough,
and Sulloway, Hollis & Soden were on brief, for appellees.*

November 15, 1982

*** Of the Second Circuit, sitting by designation.**

COFFIN, Chief Judge. Bernard Colokathis appeals from an order of the District Court of New Hampshire dismissing his complaint for want of prosecution. After hearing oral argument from the parties and carefully reviewing the record, we conclude that the district court was within the proper exercise of its discretion in dismissing the case.

The case has a long history. We rehearse here only the highlights. Plaintiff filed his complaint in November of 1977. Extensive discovery was conducted by plaintiff's first trial counsel and a trial date was set for June 9, 1980. On May 6, 1980, the case was continued on the court's own motion and the trial date was changed to December 29, 1980. On September 24, 1980, plaintiff's counsel withdrew, citing serious and irreconcilable differences with the plaintiff. There followed a parade of new counsel for the plaintiff, totalling at least seven by May of 1982.¹ One of the new counsel, David DePuy, entered on December 10, 1980. Because he "had not had an opportunity to review all of the pleadings and discovery compiled to date", he asked for and was granted a continuance in the trial from the scheduled December 29, 1980 date to December 7, 1981.

On January 15, 1981, another new counsel, Leo Hirsch, appeared on behalf of plaintiff. He advised the court that he expected to be able to review the file of approximately 4,000 to 5,000 pages within six weeks of receiving it. The court gave him until March 16, 1981 to notify the court and parties what further discovery would be necessary to prepare the plaintiff's case for trial. On March 11, 1981, the plaintiff reported to the court that it was "impossible to complete the review of the file in a thorough manner so as to be able to decide what additional discovery might be required by March 16, 1981." The court

¹ There is some confusion as to the exact number of attorneys. Plaintiff counts ten, five local counsel and five out of state trial counsel, but his count includes two attorneys who may never have formally appeared in the action. In any case, seven are enough.

granted an extension to July 31, 1981. On May 22, 1981, attorney Hirsch outlined his requested discovery and defendants objected. On June 11, 1981, the court announced that the case would take priority on his calendar and that "[n]o further continuance will be granted." At a hearing on September 11, 1981, the trial judge expressed his concern over "the lack of any discovery since my Order of January 20, 1981, and the close proximity of final pretrial on November 20, 1981 and trial date of December 7, 1981" and ordered a September 11, 1981 cutoff for plaintiff's additional discovery requests and an October 8, 1981 hearing on discovery objections.

On September 16, 1981, plaintiff's local counsel withdrew. Plaintiff failed to appear at the discovery hearing, held on October 9, and the court denied the discovery requests. On October 21, 1981, attorney Hirsch moved to have the October 9 orders withdrawn, arguing that they amounted to a denial of due process.

On October 28, 1981, new local counsel appeared and moved to continue, arguing that attorney Hirsch had not received notice of the October 9 hearing and that "at the very best the discovery conducted by plaintiff's previous trial counsel was inadequate." On November 13, 1981, the trial judge denied the motion to withdraw the October 9 orders, denied all further discovery and all further continuances, "absent the most exigent of circumstances", and ordered that "this case will proceed to trial as presently scheduled, or it will be dismissed with prejudice." Because of the trial judge's illness, the trial date was changed again, to April 27, 1982. The final pretrial conference was scheduled for April 8, 1982.

On April 2, 1982, attorney Hirsch withdrew, citing "irreconcilable differences" with the plaintiff over the payment of legal fees and the conduct of the case. On April 6, 1982, the court dismissed the case. The court noted the dilatory tactics of the plaintiff, the cost to the defendants, the waste of judicial resources and the probability of further delay. Plaintiff's local

counsel moved to reinstate the case, assuring the court that he was ready, willing and able to proceed with the case as scheduled. The court denied the motion.

On appeal, plaintiff argues that the court abused its discretion by not considering less drastic sanctions than dismissal and by not waiting until the date set for trial to determine whether the latest change in counsel would result in further delay of the case. He also asserts that he should have had notice and a hearing prior to the dismissal of his case or at least an opportunity to explain to the court the reasons for the actions that provoked dismissal. We disagree.

We have had several occasions recently to rehearse the standards for dismissal, under Fed. R. Civ. P. 41(b), for want of prosecution. As we noted in *Medeiros v. United States*, 621 F.2d 468, 470 (1st Cir. 1980) (*quoting Zavala Santiago v. Gonzalez Rivera*, 553 F.2d 710, 712 (1st Cir. 1977)):

"A district court unquestionably has the authority to dismiss a case with prejudice for want of prosecution; this power is necessary to prevent undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. *See Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); 9 Wright & Miller, Federal Practice and Procedure §2370 at 199. Because of the strong policy favoring the disposition of cases on the merits, *see Richman v. General Motors Corp.*, 437 F.2d 196, 199 (1st Cir. 1971), we, and federal courts generally, have frequently warned that dismissals for want of prosecution are drastic sanctions, which should be employed only when the district court, in the careful exercise of its discretion, determines that none of the lesser sanctions available to it would truly be appropriate. *See Asociacion de Empleados v. Rodriguez Morales*, 538 F.2d 915 (1st Cir. 1976); *Richman v. General Motors Corp.*, *supra*. *See also Durgin v. Graham*, 372 F.2d 130, 131 (5th Cir. 1972). But we have not hesitated to affirm dismissals of suits for want of prosecution in the appropriate cases. *See Pease v. Peters*, 550 F.2d 698 (1st

Cir. 1977); *Asociacion de Empleados v. Morales, supra*; cf. *Luis Forteza e Hijos, Inc. v. Mills*, 534 F.2d 415 (1st Cir. 1976)."

This was an appropriate case for dismissal. The court had endured four and a half years of delay and confusion, contributed to by at least seven different attorneys for the plaintiff. It had repeatedly warned that no further delay would be countenanced. In light of the prior requests for continuances to give new counsel the opportunity to familiarize themselves with the voluminous record and the fact that local counsel, prior to the withdrawal of attorney Hirsch, apparently had little involvement in the conduct of trial preparation, the district court was warranted in concluding that the most recent changing of the guard could only signal further delay. We see no reason why the court and the defendants should have been put to the further trial preparation expense that would have been required had the court waited to dismiss the case when the plaintiff actually requested further delay.

As plaintiff points out, we have counseled in other cases that the court should consider less drastic sanctions than dismissal. See *Zavala Santiago v. Gonzalez Rivera*, 553 F.2d 710, 712 (1st Cir. 1977) (suggesting sanctions such as a warning, a formal reprimand, placing the case at the bottom of the calendar list, a fine, the imposition of costs or attorney fees, and the temporary suspension of the counsel from practice). Here we see no less drastic sanction that would have served to prevent the further delay and harassment of the court and the defendants that the court's order sought to avoid.

Nor are we persuaded that the plaintiff was entitled to notice and a hearing before the court dismissed the case. The Supreme Court has made clear that "when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633

(1962). See also *Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981).

In light of the fact that plaintiff's problems are apparently due largely to his own inability to get along with his counsel, with the result that after four and a half years the case was still not prepared for trial, and of the court's repeated warning that further delay would result in dismissal of the case, we cannot say that there was any unfairness to the plaintiff in the fact that he was not afforded one final opportunity to try to persuade the court that the history of delays would not be repeated.

The judgment of the district court is affirmed.

1b

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 82-1410

BERNARD P. COLOKATHIS

Plaintiff/ Appellant

v.

WENTWORTH-DOUGLASS HOSPITAL, ET AL

Defendants, Appellees

**MOTION FOR EXTENSION OF TIME
FOR WHICH TO FILE
PETITION FOR REHEARING**

NOW COMES Bernard P. Colokathis and moves that the time in which to file a Petition for Rehearing, filed herewith, be extended to December 10, 1982.

Respectfully submitted,
Bernard P. Colokathis,
By his Attorneys,
STEPHEN R. FINE & ASSOC., PA

December 7, 1982

By _____

Charles A. Meade
99 Middle Street
Manchester, N.H. 03101

I certify that a copy of the foregoing Motion was mailed this day to Robert M. Larsen, opposing counsel at Sulloway, Hollis & Soden, Concord, N.H..

Charles A. Meade

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 82-1410.

BERNARD P. COLOKATHIS,
Plaintiff, Appellant,

v.

WENTWORTH-DOUGLASS HOSPITAL, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered December 10, 1982

Upon consideration of appellant's motion for extension of time within which to file petition for rehearing which motion was received after mandate had issued under the Rules,

It is ordered that said motion for enlargement of time is denied and the Clerk is directed to return the tendered petition to counsel.

By the Court:

/s/ DANA H. GALLUP

Clerk.

ld

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 82-1410

BERNARD P. COLOKATHIS

Plaintiff, Appellant

v.

**WENTWORTH-DOUGLASS HOSPITAL,
JOHN L. BECKWITH, WILLIAM CUSECK, JR.,
ROGER C. TEMPLE, H. JACK MYERS, AND JOHN NEFF**
Defendants, Appellees

**APPEAL FROM ORDER AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT,
DISTRICT OF NEW HAMPSHIRE**

BRIEF FOR DEFENDANTS

**SULLOWAY HOLLIS & SODEN
9 Capitol Street
Concord, New Hampshire 03301
(603) 224-2341**

By: Robert M. Larsen, Esq.

Of Counsel:

**Eugene Van Loan III, Esq.
A. J. McDonough, Esq.**

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases	i
Statement of Issues	1
Statement of the Case	2
Summary of Argument	8
Argument.....	9
I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO PROSECUTE IN RESPONSE TO REPEATED DILATORY CONDUCT BY THE PLAINTIFF	9
II. THE PLAINTIFF HAD NO ABSOLUTE RIGHT TO ADVANCE NOTICE AND A HEARING PRIOR TO THE DISTRICT COURT'S DISMISSAL FOR FAILURE TO PROSECUTE.....	18
III. THE DISMISSAL IMPOSED NO UNJUST PENALTY ON THE PLAINTIFF BECAUSE PLAINTIFF MUST BEAR PERSONAL RESPONSIBILITY FOR THE SUCCESSIVE WITHDRAWALS AND CONDUCT OF HIS MANY ATTORNEYS.	21
Conclusion	23

TABLE OF CASES

	<u>Page</u>
<i>Asociacion de Empleados v. Morales</i> , 538 F.2d 915 (1st Cir. 1976)	9, 10, 15, 20
<i>Corchado v. Puerto Rico Marine Management, Inc.</i> , 665 F.2d 410 (1st Cir. 1981)	10, 14, 18, 21
<i>Forteza e Hijos v. Mills</i> , 534 F.2d 415 (1st Cir. 1976)	22
<i>In Re Josephson</i> , 218 F.2d 174 (1st Cir. 1954)	9
<i>Link v. Wabash Railroad Company</i> , 370 U.S. 626 (1962)	9, 14, 18, 20
<i>Medeiros v. United States</i> , 621 F.2d 468 (1st Cir. 1980)	9, 10
<i>Pease v. Peters</i> , 550 F.2d 698 (1st Cir. 1977)	21
<i>Richman v. General Motors Corporation</i> , 437 F.2d 196 (1st Cir. 1971)	10, 16
<i>Santiago v. Rivera</i> , 553 F.2d 710 (1st Cir. 1977)	10, 16
<i>Smith v. Ayer</i> , 101 U.S. 320 (1880)	21
<i>States Steamship Co. v. Philippine Airlines</i> , 426 F.2d 803 (9th Cir. 1970)	9

STATEMENT OF ISSUES

- 1. DID THE DISTRICT COURT PROPERLY EXERCISE ITS DISCRETION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO PROSECUTE WHERE THE RECORD DEMONSTRATED REPEATED DILATORY CONDUCT BY THE PLAINTIFF?**
- 2. DID THE DISTRICT COURT PROPERLY ORDER DISMISSAL WITHOUT HEARING, WHERE THE PLAINTIFF HAD FULL AND PRIOR NOTICE OF THE CONSEQUENCES OF FURTHER DILATORY CONDUCT?**
- 3. DID THE DISTRICT COURT PROPERLY HOLD PLAINTIFF RESPONSIBLE FOR THE REPEATED DELAYS CAUSED BY THE SUCCESSIVE WITHDRAWALS AND CONDUCT OF HIS MANY ATTORNEYS?**

STATEMENT OF THE CASE

This is an appeal from an order of the District Court of New Hampshire (Loughlin, J.) dismissing plaintiff's complaint for want of prosecution.

In November, 1977, the plaintiff, a general surgeon, filed a complaint alleging, among other things, that he was denied due process of law by defendants Hospital and physicians. Over the following eighteen months discovery was aggressively undertaken by plaintiff's first trial counsel, Victor Glasberg ("Glasberg"). Plaintiff's discovery included multiple requests for documents, multiple interrogatories to various defendants as well as depositions, along with repeated hearings in response to motions to compel and for orders regulating the sequence and timing of discovery, and for costs.

At the time of Judge Loughlin's first contact with the case in May of 1979, he warned that:

"It is evident from the voluminous files and judge time so far necessitated in this case that counsel are being obdurate and making or attempting to make a travesty of the discovery process. Counsel are hereby notified that this case will be closely monitored by this Judge as it has been assigned to him. Therefore, the following orders will be strictly adhered to under the threat of sanctions." (Appendix at 379)

Thereafter, under the watchful eye of the Court, plaintiff continued extensive discovery. (Index to Appendix, 57 et seq.) As discovery progressed, the Court scheduled a final pretrial conference for May 20 and a trial date of June 9, 1980. ("first trial date"). The case was continued on the Court's own motion on May 6, 1980 and was subsequently rescheduled for trial on December 29, 1980 ("second trial date"). (Appendix at 437)

On September 24, 1980, Glasberg withdrew. He asserted in his Motion to Withdraw that serious and irreconcilable

differences had made further representation impossible. (Appendix at 444) Glasberg further stated that he had advised plaintiff approximately five months earlier that he would withdraw unless their differences were resolved. (Appendix at 444) Glasberg and local counsel, Arpiar Saunders, filed an attorney's lien on December 8, 1980. (Appendix at 451)

On October 23, 1980 Alfred Catalfo, Jr. (Catalfo) filed an appearance as counsel for the plaintiff. (Appendix at 448) Catalfo also moved Pro Haec Vice for Attorney Charles Philamore Bailey (Bailey) of New York.¹ (Appendix at 449) Catalfo then withdrew as counsel on November 14, 1980. (Appendix at 450) On December 10, 1980, R. David DePuy (DePuy) entered an appearance as counsel for plaintiff. (Appendix at 453) DePuy moved Pro Haec Vice on Behalf of Kurt J. Wolff (Wolff) in the firm of Otterbourg, Steindler, Houston and Rosen of New York, New York. (Appendix at 454)

Predictably, DePuy also moved to continue both the pretrial conference and the trial date. (Appendix at 455) This was five days before the scheduled final pretrial conference and a little more than two weeks before the second trial date.

On December 19, 1980 the Court rescheduled the trial date for December 7, 1981 ("third trial date"). (Appendix at 457) In January, 1981, Leo N. Hirsch (Hirsch) appeared on behalf of plaintiff as trial counsel along with Wolff. (Appendix at 462-63)

On January 15, 1981, a pretrial conference was held at which Hirsch first participated on behalf of plaintiff. (Appendix at 459; 460) Hirsch advised the Court that Attorney Glasberg's file was approximately 4,000 to 5,000 pages in length, that he would be able to review the file within six weeks

¹ Bailey never filed a formal appearance in this action and never signed any of the plaintiff's pleadings, as indicated by the Appendix. Bailey may not have formally withdrawn, as plaintiff notes, but defendants doubt seriously that he was ever in a position to try the case.

of receipt of the file (or by March 16, 1981), and that he did not anticipate any problems with the representation of plaintiff through the trial of the case. (Appendix at 460) However, on March 11, 1981, DePuy moved for an extension of the deadline. (Appendix at 464) By order of March 24, 1981, the Court extended the time for Hirsch to review the file and required him to advise the Court of further discovery by May 31, 1981. On June 11, 1981, the Court informed all counsel that this case was to be given priority and that the Court would not grant further continuances. (Appendix at 465)

Hirsch and Bailey were formally substituted as attorneys of record for Wolff on July 14, 1981. (Appendix at 467) Wolff then withdrew on July 20, 1981. (Appendix at 469) On May 22, 1981, Hirsch outlined the discovery he desired to pursue prior to the December 7 trial date. Defendants objected and the Court scheduled a further pretrial conference for August 13, 1981. At the request of all parties, the pretrial conference was continued to September 10, 1981.

The further pretrial conference was held on September 10, 1981. (Appendix at 473) At that time, the Court was clearly unhappy with the lack of any discovery activity by plaintiff subsequent to the Court's Order of January 20, 1981 as well as with the sudden push for discovery in such close proximity to the final pretrial conference scheduled for November 20, 1981 and the third trial date. (Appendix at 475) In his Order of September 11, 1981, Judge Loughlin ordered strict compliance with the Federal Rules of Civil Procedure, and a September 17 cut-off for request for additional discovery. He also scheduled a hearing on discovery objections, if any, for October 8, 1981. (Appendix at 473)

DePuy withdrew on September 16, 1981 leaving the plaintiff without local counsel in violation of Local Rule 5b. (Appendix at 476) On September 23, plaintiff gave notice of further depositions of defendants. (Appendix at 12, Docket

Entry 270) Because the defendants had previously been deposed extensively, the defendants objected. Despite adequate notice of the date of the hearing on defendants' objections, counsel for the plaintiff failed to appear at the rescheduled hearing on October 9, 1981. In response, the Court denied the discovery requests, required local counsel to appear on behalf of the plaintiff, and chided plaintiff once again for his dilatory actions. (Appendix at 12, Docket Entries 276, 277)

On October 28, 1981, Charles Meade (Meade) appeared as local counsel. On November 9, 1981, Meade moved to continue claiming that discovery by Glasberg had been inadequate, and that "trial counsel" needed additional time to prepare and take depositions. By Order dated November 13, 1981 the Court gave notice in no uncertain terms to plaintiff that this case was to proceed as scheduled, "absent the most of exigent circumstances", or it would be dismissed with prejudice. (Appendix at 502)

Shortly thereafter, Judge Loughlin suffered a stroke that required, once again, postponement of the final pretrial conference and the third trial date. The final pretrial conference was subsequently rescheduled for April 8, 1982, with trial to commence on April 27, 1982 ("fourth trial date"). (Appendix at 545)

Then, on April 2, 1982, less than four weeks prior to the fourth trial date and less than a week before the scheduled final pretrial conference, Hirsch withdrew without any prior warning. Hirsch's Motion for Leave to Withdraw blamed the plaintiff for his withdrawal on the eve of trial. According to Hirsch, the plaintiff had refused on April 1, 1982 to pay further legal fees until trial, and had not cooperated in the preparation of the case. (Appendix at 546)

In response to this development, on April 6, 1982, the Court dismissed the case. (Appendix at 552) As grounds for dismissal, the Court noted the dilatory tactics of the plaintiff

(Appendix at 552), the cost of legal expenses to the defendants (Appendix at 553; 536), the age of the action (Appendix at 552), the tremendous amount of judicial time expended in managing the case (Appendix at 554), and the probability of further delay. (Appendix at 554)

Judgment was entered on April 6, 1982. (Appendix at 555) Plaintiff's Motion to Vacate Order of Dismissal and to reinstate the trial was denied on April 14, 1982 and plaintiff subsequently brought this appeal.

SUMMARY OF ARGUMENT

It is defendants' position that the District Court properly dismissed plaintiff's complaint for want of prosecution. The Court's exercise of discretion is supported by the repeated dilatory conduct by plaintiff and the prejudice to defendants. Plaintiff cannot seriously contend that he did not have warning of this sanction. The District Court monitored this case closely and warned plaintiff again on November 13, 1981 that any more delays would result in dismissal. However, plaintiff once again became involved in a fee dispute, and failed to cooperate in the preparation for trial. The Court properly concluded that plaintiff's personal lack of cooperation with trial counsel, and consequently counsel's inability to prepare for the fourth trial date, was inexcusable in light of previous delays and justified dismissal without notice or hearing.

ARGUMENT**I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO PROSECUTE IN RESPONSE TO REPEATED DILATORY CONDUCT BY THE PLAINTIFF.**

The District Court's authority to dismiss plaintiff's complaint in this case is not at issue on appeal. This Court has repeatedly recognized the District Court's authority, under Rule 41b F. R. Civ. P. as well as its inherent power, to dismiss a complaint to prevent undue delay, docket congestion and the possible harassment of defendants. *Medeiros v. United States*, 621 F.2d 468 (1st Cir. 1980); *Asociacion de Empleados v. Morales*, 538 F.2d 915 (1st Cir. 1976); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-30 (1962).

What is at issue is whether the District Court judge abused his discretion in dismissing the complaint. This Court, on appeal, should not disturb that exercise of discretion unless, after placing itself in the position of the trial judge, the Court concludes there was a clear error of judgment in granting the dismissal. *In Re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954); *States Steamship Co. v. Philippine Airlines*, 426 F.2d 803, 804 (9th Cir. 1970). There was no such error here because Judge Loughlin's judgment is supported by a pattern of dilatory conduct by plaintiff and prejudice to the defendants.

The starting point in this determination should be a careful review of the circumstances of the case. *Medeiros, supra*, at 470. Even though this Court has never specified what circumstances justify a dismissal, the cases indicate that enough must be known about the case to permit the Court to appraise the conduct and attitude of plaintiff in relation to the progress of the case. *Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981); *Medeiros, supra* at 470; *Asociacion de Empleados, supra* at 916-17; *Santiago v. Rivera*, 553

F.2d 710 (1st Cir. 1977); *Richman v. General Motors Corporation*, 437 F.2d 196 (1st Cir. 1971).

At the outset, it is clear from Judge Loughlin's Orders that he was familiar with this case. His first contact with the case was in May, 1979. Even though the case had been filed eighteen months before he assumed control over it, his first order of June 22, 1979, clearly indicates that he had fully familiarized himself with the case. (Appendix at 379) From that date, he closely monitored it, and periodically reminded counsel of its priority and his concern for further delay. (See Appendix at 465)

At the time of dismissal, this case was the second oldest on the district court docket, with three hundred seventeen docket entries. (Appendix at 465) However, the Court need not review the voluminous record to put the District Court's action in context. The principal events leading to dismissal, in chronological order, are the Glasberg withdrawal (Appendix at 444), plaintiff's failure to pursue any discovery after the Glasberg withdrawal (Appendix at 475), plaintiff's failure to attend a scheduled pretrial conference, and the withdrawal of Hirsch. (Appendix at 546) These events took place despite repeated expressions of concern by the District Court about the status of this case. (Appendix at 379; 460; 465; 495; 536; 552)

The Complaint was filed in November, 1977. Initially, Glasberg aggressively sought discovery, submitting multiple requests for documents and interrogatories, filing motions to compel production and to regulate the scope and sequence of discovery. (Appendix, *passim*). After a stormy three year pretrial period, both parties were fully prepared to start trial on December 29, 1980. However, Glasberg suddenly withdrew on September 24, 1980, citing irreconcilable differences, apparently involving a fee dispute. (See Attorney Lien, Appendix at 451)

Predictably, Glasberg's withdrawal stopped the forward momentum of the case. New local counsel immediately moved

for a continuance on the grounds that he had not had an opportunity to review all of the pleadings and discovery compiled to that date. (Appendix at 455; ¶3 and ¶4) Although plaintiff essentially ignores this sequence of events, it has an important bearing on the dismissal. It justifies the trial judge's prediction that Hirsch's subsequent withdrawal on the eve of trial would trigger a substantial delay similar to the one encountered in 1980.

Hirsch had become trial counsel around the first month of 1981, more than three months after Glasberg's departure. Although he advised the Court and defendants on January 15, 1981 that he would be able to review the Glasberg file by March 16, 1981 and that he anticipated no problems with the representation of plaintiff through the trial of this case, he failed to conduct any discovery from January 20, 1981 to October 5, 1981 when he gave notice of the depositions of three defendants whose depositions had previously been taken. (Appendix at 12, Docket Entry 270; 473) Judge Loughlin was critical of Hirsch's prosecution of the case in his Order of September 11, 1981 when he said:

"Given the course of the case since Mr. Hirsch's appearance in January 1981 as noted above, the lack of any discovery since my Order of January 20, 1981, and the close proximity of final pretrial on November 20, 1981 and trial date of December 7, 1981, it appears that tight control and strict adherence to the Federal Rules of Civil Procedure must be followed if this case is to be tried on December 7, 1981." (Appendix at 474-75)

The last item in this Order was a scheduled hearing on objections, if any, to plaintiff's request for further discovery. (Appendix at 475) The Court held this hearing on objections on October 9, 1981. Plaintiff's counsel failed to appear, despite adequate notice. Shortly thereafter, the plaintiff moved to continue the third trial date, notwithstanding the Order of October 9, 1981 requiring the case to be tried on December 7, 1981. (Appendix at 12, Docket entries 276, 277; 492)

In response, the District Court entered an Order on November 13, 1981 in which he stated that he felt that the case had moved "another step away from trial" and in which he denied further discovery, and ordered that the case proceed as scheduled without further continuances. (Appendix at 495) Moreover, he explicitly warned that any additional delays would result in dismissal with prejudice. (Appendix at 502) It was only because of Judge Loughlin's illness that the trial date was rescheduled to April 27, 1982, with a final pretrial conference scheduled for April 8.

Hirsch's withdrawal was filed on April 2, 1982. In his Leave to Withdraw as Attorney, Hirsch stated that irreconcilable differences between the plaintiff and him had arisen over legal fees and the conduct of the action. Specifically, Hirsch stated in part:

"Plaintiff has not been cooperative in providing the undersigned with his financial records and other documents relative to the issue of damages and in introducing the undersigned to certain persons whose testimony on such issues is vital. Further, plaintiff advised the undersigned that an important prospective witness relative to the substantive issues has refused to testify and would not allow the latter to attempt to change the mind of such person." (Appendix at 548, ¶8)

Thus, Hirsch's position was that certain elements of the case had not been prepared for trial because of plaintiff's personal conduct.

These facts presented the District Court with a number of factors justifying dismissal. Even before Hirsch's withdrawal, the failure of plaintiff's counsel to conduct pretrial discovery and to attend a scheduled hearing alone would have justified a dismissal with prejudice. As this Court held in *Corchado*:

"We hope that we have made it clear by now that a district court's discretion to use the extreme sanction of dismissal for failure of counsel to respond properly to discovery orders or to fail to appear at scheduled conferences or

hearings will be upheld unless abused. (case cites omitted)" *Corchado, supra* at 413.

Accord Link, supra at 634-35.

However, the District Court rested its judgment on at least two additional and important factors. First of all, Hirsch attributed his withdrawal on April 2, 1982 not only to a fee dispute, but also to a lack of cooperation by plaintiff himself. (Appendix at 546) The matter of plaintiff's personal lack of cooperation has never been controverted by plaintiff either in his Motion to Vacate Order of Dismissal (Appendix at 556) or his brief to this Court.² Accordingly, this Court can only conclude, as did the District Court, that plaintiff had been deliberately proceeding in a dilatory fashion. Moreover, based on previous events following Glasberg's withdrawal, the Court reasonably calculated that Hirsch's withdrawal would signify yet another delay.

Apart from the plaintiff's dilatory conduct, the District Court's exercise of discretion was justified as a means to protect defendants from harassment. As the District Court noted in its Order of December 30, 1981, plaintiff's proposed depositions, although assertedly necessitated by the omission of plaintiff's previous trial counsel, were actually duplicative and unnecessary. (Appendix at 536) The combination of this conduct and the probability of further delay imposed an unreasonable cost on defendants. (Appendix at 553)

Whether or not Meade was ready to proceed with this case (as he now asserts), the District Court was neither obliged to permit local counsel to proceed nor obliged to wait for the scheduled final pretrial conference in order to let plaintiff explain that he would still go forward with local counsel.

² Both documents deny only the alleged fee dispute. (Brief at 17; Appendix at 558-59) In an Affidavit which accompanied the Motion to Vacate Order of Dismissal, the plaintiff Bernard P. Colokathis stated: "I do not agree with the statements contained in Attorney Hirsch's Motion to Withdraw relative to a fee dispute." (Appendix at 558-59)

Indeed, neither of these alternatives would have been appropriate. The plaintiff had engaged in a pattern of delay, of which the reasonably anticipated delay caused by the Hirsch withdrawal was only the last episode. The Court had already excused the lack of discovery after Glasberg's withdrawal and the failure to attend a scheduled pretrial. In light of plaintiff's conduct, the Court was not required to consider plaintiff's excuses at the pretrial. *See Asociacion, supra* at 917, n. 8.

Furthermore, the lesser sanctions of warning, formal reprimand, placing the case at the bottom of the list, a fine, the imposition of costs or attorneys fees, or the temporary suspension of counsel from practice before the Court were equally inappropriate. *See Santiago v. Rivera*, 553 F.2d 710 (1st Cir. 1977) Punishing counsel was simply not a meaningful alternative, particularly in light of the undisputed evidence that plaintiff was not cooperating with trial counsel in the preparation of the case, after five years on the docket and on the eve of the fourth scheduled trial date.

Plaintiff's reliance on *Richman v. General Motors Corporation*, 437 F.2d 196 (1st Cir. 1971), is misplaced. In *Richman*, the complaint had been on file for only nineteen months, both parties were actively conducting discovery, the case had made only nominal demand on judicial time and plaintiff had presented an adequate explanation for its Motion to Continue before the case was reached for the first time. In contrast, in the present case the complaint before Judge Loughlin was the second oldest case on the Federal District Court docket, and had involved the labor of two judges and a magistrate for approximately five years in a district whose docket had increased 70% during that time. (Appendix at 552) Additionally, the plaintiff had failed to conduct serious discovery, had missed a pretrial hearing and for the second time had driven experienced trial counsel to withdraw on the eve of the fourth trial date. (Appendix at 553-54)

In short, the circumstances of this case justify the dismissal of plaintiff's complaint with prejudice. The District Court was faced with a clear record of delay by plaintiff culminating in the withdrawal of Attorney Hirsch. Accordingly, the Court did not abuse its discretion ordering dismissal.

II. THE PLAINTIFF HAD NO ABSOLUTE RIGHT TO ADVANCE NOTICE AND A HEARING PRIOR TO THE DISTRICT COURT'S DISMISSAL FOR FAILURE TO PROSECUTE.

The District Court dismissed plaintiff's complaint without notice several days before the scheduled final pretrial. (Appendix at 550; 552) Although plaintiff now argues that he was constitutionally entitled to prior notice and opportunity to explain the withdrawal, recent decisions in this Circuit hold that a dismissal for want of prosecution without notice and hearing is within the sound discretion of the District Court. *Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410, 413 (1st Cir. 1981). Under the circumstances of this case, dismissal of the complaint without advance notice and hearing was well within the bounds of permissible discretion.

This Court has been guided by the Supreme Court's holding in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) in determining what process is due before the sanction of dismissal is imposed. In *Link*, the Supreme Court noting that the absence of notice or hearing does not necessarily render such a dismissal void, held:

"The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. . . . Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand

on appeal depends not on power but on whether it was within the permissible range of the court's discretion." *Id.* at 632-33.

Appropriately, no hearing is necessary when the circumstances indicate that plaintiff knew dismissal was a likely consequence of his actions.

This Court must reasonably conclude that the plaintiff himself knew or should have known that Hirsch's eleventh hour withdrawal from this case would precipitate a dismissal. Even a cursory reading of the Court's orders from January 20 to December 30, 1981 reveals the Court's increasing displeasure with plaintiff's prosecution of the case. Specifically, the Court chided plaintiff's lack of *any* discovery during the first eight months following Hirsch's appearance (Appendix at 475), criticized the delays in locating local counsel and finally initiating renewed discovery, and justifiably took plaintiff to task for failure to appear at the pretrial hearing scheduled on October 9. (Appendix at 502)

In addition, the District Court had given fair warning that drastic sanctions would accompany any more delays in the case, including the November 13, 1981 Order which explicitly stated:

"To avoid any possibility of misconstruction of this Court's ruling we will be as laconic as possible: all further discovery is denied; all further continuances, absent the most exigent of circumstances, are denied; plaintiff's motion to withdraw the order of October 9 as to further discovery is denied; this case will proceed to trial as presently scheduled, or it will be dismissed with prejudice." Appendix at 502.

A similar warning was given great weight by this Court in *Asociacion*. There the District Court had informed plaintiff that "such failure [to file a reply or brief in opposition to defendant's Motion to Dismiss] can well be construed by the Court as a lack of interest in the prosecution of this case". *Id.* at 916, n. 3; 917.

Finally, the plaintiff must have known that Hirsch had provided the Court with sufficient reason to dismiss the case

without notice and hearing solely by predicated his withdrawal on plaintiff's personal failure to cooperate in preparing for trial. (Appendix at 548, ¶8). As discussed, Hirsch indicated that consequently, elements of the case were still not prepared for trial. Also, as noted previously, the plaintiff has never denied failing to cooperate with Hirsch. Moreover, Hirsch certainly did not need an opportunity to further explain his withdrawal.

In summary, plaintiff cannot reasonably claim that he did not have notice of the seriousness with which the Court viewed the plaintiff's previous conduct in the case and of the probability of dismissal in the event such conduct were repeated. In accordance with the rule in *Link*, the District Court's dismissal without providing plaintiff or his counsel advance notice and hearing was within the bounds of permissible discretion.

III. THE DISMISSAL IMPOSED NO UNJUST PENALTY ON THE PLAINTIFF BECAUSE PLAINTIFF MUST BEAR PERSONAL RESPONSIBILITY FOR THE SUCCESSIVE WITHDRAWALS AND CONDUCT OF HIS MANY ATTORNEYS.

Contrary to plaintiff's contentions, dismissal of this case does not punish him simply for his attorney's conduct. Even if it did, however, this Circuit recognizes the principle that each party is deemed bound by the acts of his lawyer agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney". *Smith v. Ayer*, 101 U.S. 320, 326 (1880); *Corchado, supra.*; *Pease v. Peters*, 550 F.2d 698 (1st Cir. 1977). Consequently, plaintiff in this case is charged with notice of the Court's Orders prior to dismissal and bound by the conduct of counsel, including Hirsch's last minute withdrawal.

The Supreme Court held a client bound to his attorney's inaction in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). There the Court held:

"There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." *Id.* at 633.

Even though this rule in some cases may visit the sins of counsel on plaintiff himself, this Court has deemed that penalty to be "an unavoidable side effect of the adversary system." *Corchado, supra* at 413.

As the record demonstrates, the plaintiff in this case is not doing penance simply for the acts of an attorney. The undisputed facts are that plaintiff had as many as nine (9) lawyers (Glasberg, Blanchard, Saunders, Catalfo, Bailey, Wolff, DePuy, Hirsch and Meade) work on this case at one time or another, and that shortly before the second trial date his experienced trial counsel of three years withdrew citing irreconcilable differences. Then, days before the fourth trial date, Hirsch withdrew citing once again irreconcilable differences, including the plaintiff's personal lack of cooperation.

Under these circumstances, dismissal without notice did not impose an unjust penalty on plaintiff. *See Forteza e Hijos v. Mills*, 534 F.2d 415, 418 (1976).

CONCLUSION

For the reasons stated, the defendants, Wentworth-Douglass Hospital, John L. Beckwith, William Cuseck, Jr., Roger C. Temple, H. Jack Myers, and John Neff, urge that this Court affirm the order and judgment of the District Court.

Respectfully submitted,

WENTWORTH-DOUGLASS HOSPITAL,
JOHN L. BECKWITH, WILLIAM
CUSECK, JR., ROGER C. TEMPLE,
H. JACK MYERS, AND JOHN NEFF
By SULLOWAY HOLLIS & SODEN

Dated: July 23, 1982

By _____

Robert M. Larsen
Of Counsel:

Eugene Van Loan, III, Esq.
A.J. McDonough, Esq.

CERTIFICATE

I certify that a copy of the within Brief has been delivered to Charles A. Meade, Esq., counsel for the Appellant.

By _____

Robert M. Larsen

Dated: July 23, 1982